Touro Law Review

Volume 7 | Number 1 Article 2

1990

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TOURO
LAW REVIEW

Vol. 7, No. 1 Fall 1990

WHERE TO DRAW THE GUIDELINE: FACTORING THE FRUITS OF ILLEGAL SEARCHES INTO SENTENCING GUIDELINES CALCULATIONS

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INTRODUCTION

The promulgation of the sentencing guidelines ("Guidelines") that now govern the imposition of sentence upon the vast majority of persons convicted in federal court[1] represents

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The views expressed in this Article are solely those of the authors and should not be taken to represent the views of the United States Department of Justice or the United States Attorney's Office for the District of New Jersey.

1. The Guidelines are applicable only to offenses committed after November 1, 1987. *See* 18 U.S.C. § 3551 note (1988). Additionally, the Guidelines do not apply to many organizational offenses, do not apply to all regulatory offenses, and do not

a shift in the philosophy and actual functioning of federal sentencing law and procedure of the most fundamental nature. Traditionally, federal judges have had almost unfettered discretion in determining the length and conditions of defendants' sentences. A judge was essentially free to take into consideration whatever factors he deemed pertinent,[2] subject only to the modest check that the sentence he handed down be within the broad range of permissible sentences Congress had established for the specific crime or crimes of which a defendant had been convicted[3] and that it not be based on unconstitutional factors.[4]

The United States Sentencing Commission's ("Sentencing Commission") establishment of the Guidelines, pursuant to the authority granted it by the Sentencing Reform Act of 1984[5] ("Sentencing Reform Act"), is a conscious rejection of this approach. Over the years, an increasing number of commentators, perhaps most influentially former United States District Judges Marvin Frankel and Harold Tyler, expressed concerns about the lack of guidance provided judges for their sentencing determinations and the wide disparity in sentences that different judges imposed upon seemingly similar defendants for

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apply at all to petty offenses. *See* UNITED STATES SENTENCING COMMISSION, FEDERAL SENTENCING GUIDELINES MANUAL §§ 1A4 to 1A5, at 1.4-.11 (1989) [hereinafter GUIDELINES MANUAL].

2. *See, e.g.*, United States v. Tucker, 404 U.S. 443, 446 (1972) (in considering what sentence to impose, "a judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come."); *see also* Williams v. New York, 337 U.S. 241, 246 (1949) (a judge may "exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law.").

3. *See* 18 U.S.C. § 1111 (1988) (a judge may sentence a defendant guilty of second degree murder to life imprisonment, or any term of years of imprisonment); 18 U.S.C. § 1112 (1988) (a judge may sentence a defendant guilty of voluntary manslaughter to imprisonment not exceeding ten years); 18 U.S.C. § 81 (1988) (defendant guilty of certain arson offenses may be fined not more than $1000 or imprisoned no longer than five years, or both).

4. *See, e.g.*, *Tucker*, 404 U.S. at 448-49.

5. Pub. L. No. 98-472, tit. 2, ch. 2, 98 Stat. 1837, 1987 (1984) (codified as amended at 18 U.S.C. §§ 3551-3673 (1988); 28 U.S.C. §§ 991-998 (1988)). The Sentencing Reform Act was enacted as part of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, tit. 2, 98 Stat. 1837, 1976 (1984).

seemingly similar crimes.[6] The Guidelines seek to standardize sentencing decisions through assignment of numerical values to what the Sentencing Commission perceived to be the salient factors that should be considered when a judge imposes a sentence on a defendant. The interplay between these quantified factors determines the sentence that may be imposed.

Through this effort to objectify the previously subjective sentencing process, the Guidelines attempt to rein in the discretion of judges in the affixing of sentences and thus bring about — in theory at least — a uniformity of sentencing that had been lacking. As Thomas Hutchison and Professor David Yellen have succinctly stated in the introduction to their annotation of and commentary on the Guidelines, "The primary purpose of the Sentencing Reform Act and the sentencing guidelines is to bring about equality of punishment, so that similarly situated defendants convicted of similar offenses are similarly punished."[7]

This sea change in the manner in which defendants are sentenced in the federal courts has, as might be expected, raised a host of issues.[8] It is with one of these issues — the interplay

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6. S. REP. NO. 225, 98th Cong., 1st Sess. 37, 37-46, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3220, 3220-29. The Senate Report on the Sentencing Reform Act documents some of this disparity. For instance, a 1974 report found that while the average sentence nationwide for bank robbery was eleven years, the average within the Northern District of Illinois was only five and a half years, one half the national average. *Id.* at 41, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3220, 3224. A 1972 study found that the range of average sentences for forgery ran from a high of 82 months in the District of Columbia Circuit to a low of 30 months in the Third Circuit, while the average sentence for interstate transportation of stolen motor vehicles ranged from 42 months in the Tenth Circuit to 22 months in the First Circuit. *Id.* n.21 (citing Seymour, *1972 Sentencing Study for the Southern District of New York*, 45 N.Y. ST. B.J. 163, 167 (1973)).

7. T. HUTCHISON & D. YELLEN, FEDERAL SENTENCING LAW AND PRACTICE V (1989) [hereinafter HUTCHISON & YELLEN].

8. The broadest issue, of course, is whether the Guidelines are — as a matter of both fact and principle — an improvement over the sentencing system that had previously been in place. The literature is replete with both praise for and criticism of the Guidelines and the effect they have had not only on the way that sentences are imposed, but (at least arguably) on the entirety of the federal criminal justice system, including, according to certain observers and practitioners, the manner in which crimes are charged, the way that plea bargaining is conducted, the number of cases that go to trial, and the length of sentences actually served. *See, e.g.*, Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They*

between the Guidelines and the exclusionary rule that derives from the fourth amendment's prohibition against unreasonable searches and seizures — with which this Article is concerned.

I. THE EXCLUSIONARY RULE

The fourth amendment to the United States Constitution declares it to be the right of all citizens "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . ."[9] As a means of ensuring that the protections afforded by the fourth amendment are enforced, the courts have created what has come to be known as the exclusionary rule, under which evidence obtained in violation of the fourth amendment, or unearthed as a result of the illegal seizure of such evidence, cannot be used in a criminal trial of the victim of the unconstitutional search and seizure.[10] This rule has always been controversial and, as is widely known, still

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Rest, 17 HOFSTRA L. REV. 1 (1988); Ogletree, *The Death of Discretion? Reflections on the Federal Sentencing Guidelines*, 101 HARV. L. REV. 1938 (1988); Wilkins, *Plea Negotiations, Acceptance of Responsibility, Role of the Offender, and Departures: Policy Decisions in the Promulgation of Federal Sentencing Guidelines*, 23 WAKE FOREST L. REV. 181 (1988). *See also* 1990 REPORT OF THE FEDERAL COURTS STUDY COMM. 133-44 (discussing "certain dysfunctions in the current sentencing system . . . ."); 1989 UNITED STATES SENTENCING COMM'N ANN. REP. 11-62 (analysis of implementation and effectiveness of, and compliance with, Guidelines).

The Guidelines, moreover, have been challenged on constitutional grounds. Resolving the most fundamental of the constitutional questions surrounding the Guidelines, the Supreme Court, in Mistretta v. United States, 488 U.S. 361 (1989), upheld the constitutionality of the Guidelines against separation of powers and excessive delegation challenges. Subsequent circuit court decisions have rejected further constitutional challenges to the Guidelines. *See, e.g.*, United States v. Bucaro, 898 F.2d 368 (3d Cir. 1990) (Guidelines provision concerning consideration of offenses committed prior to age 18 not unconstitutional *ex post facto* law nor violative of due process); United States v. Zapata-Alvarez, 911 F.2d 1025 (5th Cir. 1990) (Guidelines do not violate presentment clause); United States v. Erves, 880 F.2d 376 (11th Cir.) (Guidelines do not violate procedural or substantive due process), *cert. denied*, 110 S. Ct. 416 (1989); United States v. Brittman, 872 F.2d 827 (8th Cir.) (Guidelines not violative of due process), *cert. denied*, 110 S. Ct. 184 (1989).

9. U.S. CONST. amend. IV.

10. *See, e.g.*, Weeks v. United States, 232 U.S. 383 (1914) (federal officers prohibited from using evidence at trial obtained in violation of fourth amendment); Mapp v. Ohio, 367 U.S. 643 (1961) (extension of exclusionary rule to state actions); Wong Sun v. United States, 371 U.S. 471 (1963) (extension of exclusionary rule to

engenders widespread debate even while other far sweeping constitutional remedies, such as those provided by cases such as *Miranda v. Arizona*[11] and *Gideon v. Wainwright*,[12] have outlived their controversial beginnings to become pillars of modern American constitutional jurisprudence.[13]

The exclusionary rule engenders controversy because physical evidence tending to show guilt, regardless of the method in which it was obtained, is — as distinguished, for example, from testimony — inherently reliable. Moreover, according to the Supreme Court, the purpose of the fourth amendment exclusionary rule is not to provide redress for trespasses upon individuals' right to privacy, which may be accomplished by, for instance, civil suits against official wrongdoers.[14] Rather, the essential purpose of the exclusionary rule is deterrence:[15] Law enforcement officials, knowing that illegally obtained evidence cannot be used at the trial of suspects whom they apprehend, will make certain that constitutionally mandated procedures, such as proper warrants, are utilized.[16] "The rule is calculated to prevent, not to repair. Its purpose is to deter — to compel respect for the constitutional guaranty in the only effectively available way — by removing the incentive to disregard it."[17]

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include "fruits" of illegally seized evidence as well as evidence directly seized in unlawful search).

11. 384 U.S. 436 (1966) (exclusion from trial of confessions obtained absent a suspect's being made aware of his rights under the fifth amendment).

12. 372 U.S. 335 (1963) (right of indigent defendant in a criminal trial to have appointed counsel).

13. Justice Blackmun's remark fifteen years ago that "[t]he debate within the Court on the exclusionary rule has always been a warm one," United States v. Janis, 428 U.S. 433, 446 (1976), remains equally true today, both among the Supreme Court jurists and within our society as a whole. Nearly every Supreme Court decision applying the exclusionary rule has been the product of a sharply divided Court, including the Court's ruling last year in James v. Illinois, 110 S. Ct. 648, (1990) (5-4 decision). *See, e.g.*, Illinois v. Rodriguez, 110 S. Ct. 2793 (1990) (6-3 decision); Illinois v. Krull, 480 U.S. 340 (1987) (5-4 decision); Segura v. United States, 468 U.S. 796 (1984) (5-4 decision); Lustig v. United States, 338 U.S. 74 (1949) (5-4 decision).

14. *See, e.g.*, Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

15. *See, e.g.*, United States v. Calandra, 414 U.S. 338, 347 (1974).

16. *See, e.g.*, New York v. Harris, 110 S. Ct. 1640, 1645 (1990).

17. Elkins v. United States, 364 U.S. 206, 217 (1960).

"In sum, the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved."[18]

In line with the majority view of the Court that the sole purpose of the exclusionary rule is deterrence, the Court has consistently taken the position that the scope of the rule should be a fairly narrow one[19] and that illegally obtained evidence should be barred from use only where the objective of deterrence is, in the Court's thinking, "most efficaciously served."[20] Thus, for instance, only the actual victim of an unlawful search has standing to invoke the rule;[21] the fact that incriminating evidence was obtained illegally does not bar its use against

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18. *Calandra*, 414 U.S. at 348. The rationale underlying the exclusionary rule derived from the fourth amendment thus stands in contrast to that of the constitutional remedies rooted in fifth or sixth amendment guarantees. The proscription against the use of illegally obtained confessions, for instance, is based to a large degree upon the dubious reliability of such confessions and upon the Court's sense of the inequity of using a coercively obtained confession against the subject of such coercion at his trial. *See Miranda*, 384 U.S. at 466-67. A trial in which a defendant is denied access to adequate legal representation similarly ceases to be fair, and gives rise to serious doubt about the correctness of its outcome. *See* Strickland v. Washington, 466 U.S. 668 (1984).

19. Certain Supreme Court Justices have vigorously rejected this narrow view of fourth amendment protection. *See, e.g.*, *Calandra*, 414 U.S. at 355-67 (Brennan, J., dissenting) (quoting Justice Holmes' and Justice Brandeis' dissents in Olmstead v. United States, 277 U.S. 438, 470, 485 (1928) (Holmes, Brandeis, JJ., dissenting)); Terry v. Ohio, 392 U.S. 1, 12-13 (1968) (Warren, C.J.). The position that the exclusionary rule is necessary solely for its value as a deterrent is, therefore, far from universally accepted. This issue, however, is beyond the scope of this Article.

20. *Calandra*, 414 U.S. at 348.

21. *See id.* ("standing to invoke the exclusionary rule has been confined to situations where the Government seeks to use such evidence to incriminate the victim of the unlawful search."); Brown v. United States, 411 U.S. 223, 230 (1973) (" 'Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted. . . .' ") (quoting Alderman v. United States, 394 U.S. 165, 174 (1969)); Alderman v. United States, 394 U.S. 165, 171-72 (1969) ("suppression of the product of a Fourth Amendment violation can be successfully urged only by those whose rights were violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence."). "This standing rule is premised on a recognition that the need for deterrence and hence the rationale for excluding the evidence are strongest where the Government's unlawful conduct would result in imposition of a criminal sanction on the victim of the search." *Calandra*, 414 U.S. at 348; *cf.* FED. R. CRIM. P. 41(e).

anybody but the particular individual from whom the evidence was seized in violation of the fourth amendment.[22] In addition, the Court's recognition of a "good faith" exception to the exclusionary rule,[23] as well as other exceptions,[24] demonstrates the Court's narrow interpretation of this rule.

The exclusionary rule, therefore, as interpreted by the Supreme Court, is a tool of deterrence which prevents the direct use of evidence obtained in contravention of the fourth amendment against the subject of an illegal search at her trial. Such evidence, however, may at times be of potential relevance at other than a criminal trial. In *United States v. Calandra*,[25] the Supreme Court grappled with such a situation and established the framework under which the applicability of the fourth amendment exclusionary rule to proceedings outside of actual criminal trials is to be analyzed.

Calandra arose when a witness summoned to testify before a grand jury refused to answer questions on the ground that they were based on evidence obtained from an unlawful search and

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22. *See supra* note 21.

23. *See* United States v. Leon, 468 U.S 897 (1984) (where a police officer in good faith relies on a search warrant that is later held defective, the evidence obtained under such search warrant is admissible against the defendant).

24. *See, e.g.*, Nix v. Williams, 467 U.S. 431, 444 (1984) (adopting the "inevitable discovery exception," stating that "[i]f the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means . . . then the deterrence rationale has so little basis that the evidence should be received"); Walder v. United States, 347 U.S. 62, 65 (1954) (creating "impeachment exception" to exclusionary rule whereby government may refer to and adduce testimony concerning illegally seized evidence for limited purpose of impeaching defendant's testimony); *cf.* James v. Illinois, 110 S. Ct. 648, 652 (1990) (refusal to extend impeachment exception to witnesses other than the defendant himself because this result would undermine the deterrent purpose of the exclusionary rule and would not substantially further its truth-seeking function). *See also, e.g.*, Nardone v. United States, 308 U.S. 338, 341 (1939) (discussing the "attenuation doctrine," whereby challenged evidence might be admissible where the "causal connection between information obtained [illegally] . . . and the Government's proof . . . may have become so attenuated as to dissipate the taint"); Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920) (establishing "independent source exception" to exclusionary rule, under which evidence obtained as result of illegal search that is also gained from an independent source is admissible); *see generally* 1 W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE §§ 9.2-.6 (1984 & Supp. 1990).

25. 414 U.S. 338 (1974).

seizure.[26] Weighing the pros and cons of applying the exclusionary rule to such proceedings, the Court concluded that allowing grand jury witnesses to call upon the rule would delay and disrupt the orderly progress of grand jury investigations and might embroil the government in extended litigation of issues only tangentially related to the investigation being conducted.[27]

The Supreme Court saw little to counterbalance this potential damage to the grand jury:

> Any incremental deterrent effect which might be achieved by extending the rule to grand jury proceedings is uncertain at best. Whatever deterrence of police misconduct may result from the exclusion of illegally seized evidence from criminal trials, it is unrealistic to assume that application of the rule to grand jury proceedings would significantly further that goal. Such an extension would deter only police investigation consciously directed toward the discovery of evidence solely for use in a grand jury investigation. The incentive to disregard the requirement of the Fourth Amendment solely to obtain an indictment from a grand jury is substantially negated by the inadmissibility of the illegally seized evidence in a subsequent criminal prosecution of the search victim. For the most part, a prosecutor would be unlikely to request an indictment where a conviction could not be obtained.[28]

The Court's holding that the exclusionary rule does not apply to grand jury proceedings followed easily from its assessment of the relative weight of the interests involved.[29]

Calandra's framework for analysis of the breadth of the exclusionary rule has become the benchmark for subsequent judicial determinations as to the applicability of the rule to proceedings besides criminal trials themselves. For instance, in *United States v. Janis*,[30] the Supreme Court employed the ap-

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26. *Id.* at 341.

27. *Id.* at 349. The Court also observed that, because grand juries do not act as final adjudicators of guilt or innocence, they had traditionally been exempt from evidentiary and procedural restrictions applicable to criminal trials. *Id.*

28. *Id.* at 351.

29. *Id.* at 351-52. In *Calandra*, Justice Brennan, joined by Justices Douglas and Marshall, issued a vigorous dissent that chastised the majority's "downgrading of the exclusionary rule" as "reflect[ing] a startling misconception, unless it is a purposeful rejection, of the historical objective and purpose of the rule." *Id.* at 356 (Brennan, J., joined by Douglas and Marshall, JJ., dissenting).

30. 428 U.S. 433 (1976).

proach used in *Calandra* in finding the exclusionary rule inapplicable to a civil tax proceeding.[31] In *Immigration and Naturalization Service v. Lopez-Mendoza*,[32] the Supreme Court relied upon *Calandra* and *Janis* to find that the exclusionary rule did not apply to civil deportation hearings.[33] Circuit courts have similarly utilized *Calandra* in analyzing the applicability of the exclusionary rule to, for example, probation[34] or parole[35] revocation hearings and civil actions between private parties.[36]

II. APPLICABILITY OF EXCLUSIONARY RULE TO PRE-GUIDELINES SENTENCING PROCEEDINGS

The Supreme Court has never addressed the question of whether the exclusionary rule that the courts have derived from the fourth amendment's stricture against unreasonable searches and seizures covers the sentencing as well as the adju-

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31. *Id.* at 458-60. In this pre-United States v. Leon, 468 U.S. 897 (1984) case, *see supra* note 23, the Court employed *Calandra* to hold that the exclusionary rule would not extend to "evidence obtained by a state criminal law enforcement officer in good-faith reliance on a warrant that later proved to be defective . . . in a federal civil tax proceeding." *Janis*, 428 U.S. at 447; *see also id.* at 459-60.

32. 468 U.S. 1032 (1984).

33. The *Lopez-Mendoza* Court described the balancing process as follows:

> Imprecise as the exercise may be, the Court recognized in *Janis* that there is no choice but to weigh the likely social benefits of excluding unlawfully seized evidence against the likely costs. On the benefit side of the balance "the 'prime purpose' of the [exclusionary] rule, if not the sole one, 'is to deter future unlawful police conduct.' ". . . On the cost side there is the loss of often probative evidence and all of the secondary costs that flow from the less accurate or more cumbersome adjudication that therefore occurs.

Id. at 1041 (citation omitted).

34. *E.g.*, United States v. Bazzano, 712 F.2d 826, 831 (3d Cir. 1983) (en banc) (exclusionary rule not applicable to probation revocation hearing), *cert. denied*, 465 U.S. 1978 (1984); United States v. Vandemark, 522 F.2d 1019, 1025 (9th Cir. 1975) (same).

35. *E.g.*, United States *ex rel.* Sperling v. Fitzpatrick, 426 F.2d 1161 (2d Cir. 1970) (exclusionary rule not applicable to parole revocation hearing). Although *Sperling* was decided prior to *Calandra*, it utilized the same logic and approach as the Supreme Court later employed in deciding *Calandra*.

36. Honeycutt v. Aetna Ins. Co., 510 F.2d 340, 348 (7th Cir.) ("the Fourth and Fourteenth Amendments do *not* require in civil cases that the exclusionary rule be extended to situations where private parties seek to introduce evidence obtained through unauthorized searches made by state officials.") (emphasis in original), *cert. denied*, 421 U.S. 1011 (1975).

dicatory stage of criminal proceedings.[37] However, several circuit courts, in cases decided prior to the implementation of the Guidelines, have confronted this issue. While these courts declined to lay down a blanket rule designed to govern all sentencing decisions, they nonetheless established that judges generally have the discretionary power to consider evidence obtained in violation of the fourth amendment in pronouncing sentence.

The only case to take a contrary view was the first to address the issue. In *Verdugo v. United States*,[38] the Court of Appeals for the Ninth Circuit held that, under the circumstances which that case presented, illegally seized evidence could not be used to enhance a sentence.[39] The court initially noted the "strong public interest in the imposition of a proper sentence — one based upon an accurate evaluation of the particular offender and designed to aid in his personal rehabilitation."[40] Taking cognizance of the free rein traditionally granted federal judges in sentencing determinations, the court further observed, "The permissible scope of the sentencing judge's inquiry is accordingly broad, and limitations are not lightly imposed either upon the kind of information the court may consider or the source from which it may be obtained."[41] But, the court continued, it did not necessarily follow that illegally seized evidence could always be considered at sentencing.[42] For example, the use of such evidence would manifestly be improper where, after a conviction had already been obtained, an illegal search of the defendant's home was conducted in a "misguided effort to furnish the court with" additional information for its consideration in sentencing.[43]

In Verdugo's case, the government already possessed evidence sufficient to convict Verdugo of the specific offense with

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37. *See infra* note 88.

38. Verdugo v. United States, 402 F.2d 599 (9th Cir. 1968), *cert. denied*, 402 U.S. 961 (1971).

39. *Id.* at 613.

40. *Id.* at 611.

41. *Id.*

42. *Id.*

43. *Id.*

which he had been charged — a particular drug transaction on a single date — when the decision to search his home was made.[44] In conducting the search, the court found, the government agents were not seeking additional evidence pertaining to that specific offense; rather, they hoped to find a wholesale supply of heroin that could be used against Verdugo at his sentencing.[45] Since "[t]he range of [the] possible penalty that Verdugo faced was wide — five to twenty years[,]" the agents had a strong incentive for making the search:[46] The duration of the sentence to be handed down would in all likelihood be quite different if the government could show that Verdugo was a large-scale dealer rather than merely the seller in a single small transaction. Allowing the illegally seized evidence to be used in the circumstances this case presented, the court concluded, would create an incentive for the conducting of illegal searches.[47] The court reasoned:

> If the fruits of the search could be used to enhance the sentence, the possibility that the evidence might be excluded at trial would be of little importance in view of the untainted evidence available to establish the [charged] offense. Unless the evidence were unavailable for sentence as well as conviction, the agents had nothing to lose by risking an unlawful search: if the motion to suppress were denied, Verdugo could be convicted of an additional offense; if it were granted, the sentence on the original charge could still be enhanced. . . .
>
> And even if it were true that there is now no general consciousness of the potential utility of illegally seized evidence to enhance sentence, we could not ignore the fact that announcement of an exception to the exclusionary rule would inevitably produce it.[48]

Judge Byrne dissented from the majority's conclusion in *Verdugo* that the consideration of the illegally obtained evidence was improper,[49] relying in large part on the Supreme Court's decision in *Williams v. New York*.[50] In *Williams*, the Supreme Court upheld a judge's imposition of a sentence of

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44. *Id.* at 612.
45. *Id.*
46. *Id.*
47. *Id.*.
48. *Id.* (footnote omitted).
49. *Id.* at 619 (Byrne, J., dissenting in part).
50. 337 U.S. 241 (1949).

death that the judge had based in part on his consideration of information in a probation department report that had been supplied by witnesses with whom the defendant had not been confronted and as to whom the defendant had no opportunity for cross-examination or rebuttal.[51] The Court rejected a challenge on due process grounds, finding that the constitutional rights of confrontation and cross-examination that govern criminal trials are not constitutionally mandated where sentencing is concerned.[52] The Court stated:

> [B]oth before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed by limits fixed by law. . . .
>
> Highly relevant — if not essential — to his selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics. And modern concepts individualizing punishment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial.[53]

Judge Byrne found the holding and reasoning of *Williams* equally applicable where evidence obtained in violation of the fourth amendment is concerned.[54]

Cases handed down after *Verdugo* have either distinguished it or limited it to little beyond its fairly unusual set of facts. In *United States v. Schipani*,[55] the sentencing judge had acknowledged that the "primary reason for the severity of the sentence [in this tax evasion case] was the judge's conclusion that appellant was a 'professional criminal[,]' "[56] a conclusion based on information obtained through unlawful wiretapping.[57] Upon appeal, the Second Circuit noted that "[a] sentencing judge's access to information should be almost completely unfettered

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51. *Id.* at 245-46, 252.
52. *Id.*
53. *Id.* at 246-47 (footnotes omitted).
54. Verdugo v. United States, 402 F.2d 599, 619 (9th Cir. 1968) (Byrne, J., dissenting in part).
55. 435 F.2d 26 (2d Cir. 1970), *cert. denied*, 401 U.S. 983 (1971).
56. *Id.* at 27.
57. *Id.*

in order that he may 'acquire a thorough acquaintance with the character and history of the man before [him].' "[58] The court also pointed out that the accuracy of the excluded evidence had not been questioned and that the information obtained through the wiretaps was highly relevant to the character of the sentence to be imposed.[59] The court concluded that invocation of the exclusionary rule a second time at sentencing after it had already been applied at trial would not significantly add to its deterrent effect.[60] Describing *Verdugo* as a case "where evidence was illegally seized to enhance the possibility of a heavier sentence after the basic investigation had been completed," which was "quite a different situation from that" in *Schipani*,[61] the court held: "Where illegally seized evidence is reliable and it is clear, as here, that it was not gathered for the express purpose of improperly influencing the sentencing judge, there is no error in using it in connection with fixing sentence."[62]

In *United States v. Vandemark*,[63] the Ninth Circuit revisited its decision in *Verdugo*. *Vandemark* posed the question of whether evidence derived from an allegedly unconstitutional stop and search of the defendant's car could be considered at the sentencing following the revocation of his probation.[64] The court first noted that the exclusionary rule does not generally apply to probation and revocation proceedings.[65] Concluding that *Calandra*, which the Supreme Court had handed down subsequent to the *Verdugo* and *Schipani* decisions, provided

58. *Id.* (quoting United States v. Doyle, 348 F.2d 715, 721 (2d Cir.), *cert. denied*, 382 U.S. 843 (1965)).

59. *Id.* at 27-28.

60. *Id.* at 28.

61. *Id.* at 28 n.1.

62. *Id.* at 28. The court specifically declined to pass upon the question of whether evidence should be excluded from consideration in sentencing where it had been seized under the circumstances that *Verdugo* presented. *Id.* at n.1.

63. 522 F.2d 1019 (9th Cir. 1975).

64. *Id.* at 1020.

65. *Id.* at 1020 (discussing holding in United States v. Winsett, 518 F.2d 51, 55 (9th Cir. 1975), that "the Fourth Amendment does not require suppression of evidence in a probation revocation proceeding where, at the time of arrest and search, the police had neither knowledge nor reason to believe that the suspect was a probationer."); *see also supra* note 34 and accompanying text.

the appropriate analytical framework, and quoting at some length from the *Williams* Court's discussion of the role and needs of a sentencing judge,[66] the court held, upon balancing the competing interests involved, that "extension of the exclusionary rule to sentencing subsequent to revocation of probation would have a disruptive effect far out of proportion to any incremental deterrence" of law enforcement misconduct that it might conceivably achieve.[67]

The *Vandemark* court rejected the contention that *Verdugo* required a contrary result. While conceding that *Verdugo* did place some restrictions upon information that a sentencing judge may properly consider in certain situations, the court read its earlier opinion as standing only for the narrow proposition that exclusion of illegally obtained evidence is required where failure to do so would provide a substantial incentive for illegal searches.[68] The court distinguished *Verdugo* on a number of grounds, specifically, that the search in *Verdugo*, unlike that in *Vandemark*, was "blatantly illegal" and highly intrusive;[69] that Verdugo was the subject of a continuing investigation in which sufficient evidence had already been obtained, while Vandemark had not been the subject of any investigation;[70] and that *Vandemark* involved a search designed solely "to obtain evidence to support a single charge,"[71] a situation that *Verdugo* had specifically distinguished.[72]

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66. *Vandemark*, 522 F.2d at 1021.

67. *Id.*

68. *Id.* at 1022-23.

69. *Id.* at 1023. In *Verdugo*, "[f]ive to seven officers ransacked the Verdugo home [for four and one-half hours], searching drawers, cabinets, and luggage, overturning furniture, removing covers from all of the house light switches, and punching holes in the wallboard." *Verdugo*, 402 F.2d at 609-10. In *Vandemark*, "[t]wo Border Patrol agents stopped Vandemark's car, checked under the cushions in the passenger compartment for illegal aliens and asked him to open the trunk." *Vandemark*, 522 F.2d at 1023.

70. *Vandemark*, 522 F.2d at 1023-24.

71. *Id.* at 1024.

72. *See Verdugo*, 402 F.2d at 612 n.21 ("[q]uite different considerations would apply if the object of the search were to obtain evidence to support a single charge on which the defendant was later convicted.").

In United States v. Larios, 640 F.2d 938 (9th Cir. 1981), the Ninth Circuit again upheld the sentencing judge's consideration of illegally obtained evidence. The illegality of the search at issue in *Larios*, a pre-United States v. Leon, 468 U.S. 897

In *United States v. Lee*,[73] the Fourth Circuit agreed with the government's contention that application of the *Calandra* test led to the conclusion that illegally seized evidence may properly be considered in sentencing.[74] The court took note of the broad scope of information that judges may consider in determining sentence[75] and the fact that, unlike constitutional infirmities such as convictions obtained in the absence of counsel,[76] evidence obtained in violation of the fourth amendment is not inherently unreliable.[77] As for deterrence, the court was of the view that the additional deterrent effect of applying the exclusionary rule to sentencing in the ordinary case "would be so minimal as to be insignificant. . . . While police officers and prosecutors usually consider that they have a stake in obtaining a conviction, . . . they have little or no interest in the specific punishment to be imposed . . . ."[78] Requiring the use at sentencing only of legitimately obtained evidence, moreover,

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(1984), case, *see supra* note 23, stemmed from a technical error in the affidavit submitted in support of the warrant. *Larios*, 640 F.2d at 942. There was no evidence that the scope of the search was overextensive or that it had been conducted inappropriately. *Id.* Applying the *Calandra* test, the court concluded that, in light of the circumstances surrounding the search, and the "very broad discretion to consider information from a wide variety of sources" that judges are provided with in making sentencing determinations, it was not error for the sentencing judge to consider the unlawfully obtained evidence in imposing sentence upon the defendant. *Id.* In the court's view, applying the exclusionary rule under these particular circumstances would not sufficiently further the purpose of deterring unlawful police conduct so as to justify its use. The court cited cases such as *Vandemark*, *Williams*, and *Tucker* in support of its conclusion, and noted *Verdugo* simply as a "*cf.*" cite, describing it as a case involving a " 'blatantly illegal,' " warrantless search and circumstances in which "the police needed to be deterred . . . ." *Id.* at 941-42. *See also* United States v. Kidd, 734 F.2d 409, 414 (9th Cir. 1984) (fact that search might be deemed unconstitutional due to defect in affidavit supporting application for warrant would not justify exclusion at sentencing of evidence discovered during search) (citing *Larios*, 640 F.2d at 942).

73. 540 F.2d 1205 (4th Cir.), *cert. denied*, 429 U.S. 894 (1976).

74. *Id.* at 1210-11.

75. *Id.* at 1210 ("a federal district judge may, before sentencing, 'conduct an inquiry broad in scope, largely unlimited either as to [the] kind of information he may consider, or the source from which it may come.' " (quoting United States v. Tucker, 404 U.S. 443, 446 (1972))).

76. *See Tucker*, 404 U.S. at 447 & n.4, 448.

77. *Lee*, 540 F.2d at 1211; *see also supra* note 18.

78. *Lee*, 540 F.2d at 1211. Interestingly, the court offered no empirical support for this assertion.

would result in procedural complications and delay that would discourage judges from relying upon a broad range of relevant information in sentencing.[79]

The Fifth Circuit has similarly held the exclusionary rule generally to be inapplicable to sentencing proceedings. In *United States v. Butler*,[80] the trial judge had considered at sentencing the fruits of a search that was unconstitutional because the affidavit that supported it did not show probable cause.[81] The Fifth Circuit found that under the circumstances presented the judge did not err in his consideration of such evidence.[82] Evidence uncovered through actions that fail to conform to the fourth amendment, the court observed, does not present a "potential for factual inaccuracy," and, the court continued, "courts [had] been hesitant to extend the exclusionary rule to situations" in which the deterrent value of the rule

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79. *Id.* at 1211-12. The court found *Schipani* and *Verdugo* to be factually distinguishable from one another and thus reconcilable: In *Verdugo*, the government had illegally seized additional evidence with the specific view of enhancing the defendant's sentence; in *Schipani*, this motive was apparently absent. *Id.* at 1212. Furthermore, the *Lee* court stated that while it agreed with *Schipani's* conclusion "that the disadvantages of applying the exclusionary rule at sentencing [were] large, [and] the benefits small or non-existent," it would also be inclined to rule as the *Verdugo* court had were it to be faced with a factual situation similar to that presented in *Verdugo*. *Id.*

In United States v. Williamson, 567 F.2d 610 (4th Cir. 1977), the Fourth Circuit reiterated, albeit in dicta and without any significant analysis, its view that consideration at sentencing of illegally obtained evidence is generally not improper. *Id.* at 615. The trial court in *Williamson* had declined to allow the introduction in the sentencing proceeding of evidence it believed to have been illegally acquired. *Id.* In the course of affirming the defendant's conviction and sentence imposed by the lower court, the Fourth Circuit stated:

> Although the district court may have been wise in not basing its sentence upon [the assertedly illegally obtained evidence and certain other items], we do not believe that error would have resulted from the introduction of such. This evidence, like all other, could be introduced and considered by the court, giving it the weight, if any, it deemed appropriate.

Id. at 616.

80. 680 F.2d 1055 (5th Cir. 1982).

81. *Id.* at 1055-56.

82. *Id.* at 1056.

appears to be less than that where an actual trial of a case is concerned.[83]

The Tenth Circuit, in *United States v. Graves*,[84] approved, after engaging in the analysis mandated by *Calandra*,[85] sentencing based on information concerning prior alleged offenses that, because of police actions and seizure of evidence in violation of the fourth amendment, had either never been charged or had been dismissed. Noting a trial judge's duty to conduct a broad, essentially unlimited inquiry before pronouncing sentence and observing that most illegally seized evidence is not inherently unreliable, the court concluded:

> [E]xtension of the exclusionary rule to sentencing or post-sentencing proceedings before federal agencies would, in the ordinary case, have a deterrent effect so minimal as to be insignificant. In the usual case, law enforcement officers conduct searches and seize evidence for the purpose of obtaining convictions, not for the purpose of increasing the sentence in a prosecution already pending or one not yet commenced. It is apparent that the significant deterrent to official lawlessness is the threat that an illegal search and seizure would render the prosecution ineffective. The additional threat that the sentence imposed in a future criminal prosecution might be less severe or that the defendant in a future case might be paroled earlier would appear to have little practical effect.[86]

The court also took cognizance of the possibility that sentencing proceedings could be "intolerably delayed and disrupted" if a court were required to determine whether every item of evidence considered at sentencing was of lawful origin.[87]

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83. *Id.* at 1055-56 (citing, *inter alia*, *Calandra*). The court rejected the defendant's reliance upon *Verdugo*, stating that *Verdugo* had not laid down a blanket rule, but rather required a case-by-case analysis, and noted that the search in *Verdugo* was "blatantly unconstitutional." *Id.* at 1056. Furthermore, the court pointed out that the Ninth Circuit itself had declined to follow *Verdugo* where the situation was less egregious. *Id.* (citing *Larios*, 640 F.2d at 941-42). *See also* United States v. Camacho, 779 F.2d 227 (5th Cir. 1985) (defendant's testimony during suppression hearing, although inadmissible at trial, may be considered by sentencing judge), *cert. denied*, 476 U.S. 1119 (1986).

84. 785 F.2d 870 (10th Cir. 1986).

85. *See supra* notes 25-29 and accompanying text.

86. *Graves*, 785 F.2d at 873.

87. *Id.* The court then went on to discuss *Verdugo*, *Vandemark*, *Larios*, *Schipani*, and *Lee*, declaring that in *Vandemark* and *Larios* the Ninth Circuit had "disavowed a broad reading of *Verdugo*." *Id.* at 874-75. *See also* United States v. Ma-

Cases decided prior to the implementation of the Guidelines thus concluded that the exclusionary rule derived from the fourth amendment's proscription against unreasonable searches and seizures did not as a general matter bar the consideration of illegally obtained evidence at sentencing proceedings.[88] Absent egregious circumstances, a sentencing judge had complete discretion to determine whether or not she wished to rely upon such evidence in imposing sentence in a particular case.

In the view of these courts, any benefit that might be gained by application of the exclusionary rule to sentencing proceedings is far outweighed by the detrimental effect it would have. Application of the rule, these courts feared, would unnecessarily restrict judges' virtually unlimited discretion to consider any and all information they considered relevant in imposing sentence, cut against principles of individualized sentencing by curtailing the amount of information that judges would have about the defendants before them, and result in unwarranted delay and complications in sentencing proceedings and procedures. Against these negatives lay only a perceivedly minimal, almost illusory, incremental deterrent to unconstitutional behavior by law enforcement officials. Additionally, although none of the reported decisions articulate such a concern, it is not inconceivable that the appellate courts also feared that instructing trial judges to disregard at sentencing often exceedingly damning information with which they had become familiar through previous proceedings, for instance, suppression hearings, would create a perverse incentive for intellectual dishonesty and rationalization in the articulated justifications for sentences imposed. The courts, therefore, established the basic pre-Guidelines rule that as a general matter a judge could

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jors, 490 F.2d 1321, 1322, 1324 (10th Cir. 1974) (sentencing judge may consider charges dismissed as part of plea bargain in imposing sentence).

88. As is noted above, *see supra* text accompanying note 37, the Supreme Court has not ruled on the issue of the applicability of the exclusionary rule to sentencing proceedings. In United States v. Janis, 428 U.S. 433 (1976), the Court took note of the fact that courts had declined to apply the rule to proceedings that were not strictly criminal prosecutions, including parole revocation, and stated, "We express no view on the issue whether sentencing and parole revocation proceedings constitute 'civil proceedings' for the purposes of the principles announced in this opinion." *Id.* at 456 n.33.

without running afoul of the Constitution choose, in her discretion, either to, or not to, take into consideration evidence obtained in violation of the fourth amendment in pronouncing sentence.

III. THE SENTENCING GUIDELINES

A. The Sentencing Reform Act of 1984

Perhaps the most fundamental precept of the traditional system of sentencing in federal court was that the judge is to be given nearly unfettered authority to impose sentence based upon consideration of all the circumstances she might deem relevant. As long as the sentence handed down fell within the statutory limits set for the crime or crimes for which the defendant had been convicted and no errors or misconceptions of a constitutional magnitude were implicated, the judge had almost unlimited discretion in determining the appropriate sentence.[89] Such essentially unbounded discretion also extended to the judge's determination of what information and factors she chose to consider in imposing sentence. Congress had specifically declared that "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."[90] Indeed, the judge's discretion was so well accepted that a sentence that fell within statutory limits was not generally subject to review.[91]

The Sentencing Guidelines are the end product of widespread dissatisfaction with this traditional system for the meting out of sentences. Individuals and organizations across a broad spectrum of political ideologies became increasingly disturbed by the essentially unchecked discretion that judges possessed with regard to what is arguably the most significant single act in the criminal justice system and the resultant

89. *See, e.g.*, United States v. Tucker, 404 U.S. 443, 447 (1972).

90. 18 U.S.C. § 3661 (1988). *See also Tucker*, 404 U.S. at 446.

91. *See, e.g. Tucker*, 404 U.S. at 447 ("a sentence imposed by a federal district judge, if within statutory limits, is generally not subject to review.") (citing Gore v. United States, 357 U.S. 386 (1958)).

disparities in seemingly similar cases.[92] This unhappiness with the law and rules that governed sentencing led to the enactment of the Sentencing Reform Act,[93] which the House and Senate each passed in October 1984 as part of the Comprehensive Crime Control Act.[94] Congress made its dissatisfaction with what it saw as the "unfettered discretion" of judges in the exercise of sentencing power unmistakably clear:

> [E]ach judge is left to apply his own notions of the purposes of sentencing. As a result, every day Federal judges mete out an unjustifiably wide range of sentences to offenders with similar histories, convicted of similar crimes, committed under similar circumstances. One offender may receive a sentence of probation, while another — convicted of the very same crime and possessing a comparable criminal history — may be sentenced to a lengthy term of imprisonment. Even two such offenders who are sentenced to terms of imprisonment for similar offenses may receive widely differing prison release dates; one may be sentenced to a relatively short term and be released after serving most of the sentence, while the other may be sentenced to a relatively long term but be denied parole indefinitely.
>
> These disparities, whether they occur at the time of the initial sentencing or at the parole stage, can be traced directly to the unfettered discretion the law confers on those judges and parole authorities responsible for imposing and implementing the sentence. This sweeping discretion flows from the lack of any statutory guidance or review procedures to which the courts and parole boards might look. These problems are compounded by the fact that the sentencing judges and parole officials are constantly second-guessing each other, and, as a result, prisoners and the public are seldom certain about the real sentence a defendant will serve.[95]

Congress sought through passage of the Sentencing Reform Act to alleviate these perceived basic flaws in the means by which criminal defendants were sentenced. To begin with, the Sentencing Reform Act gives recognition to four discrete purposes of sentencing, namely, the needs:

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92. Senators with philosophies as disparate as Edward Kennedy and Strom Thurmond are among those credited with championing the cause of sentencing reform. *See* S. REP. NO. 225, 98th Cong., 1st Sess., 37, 37, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3220, 3220.

93. Pub. L. No. 98-473, tit. 2, ch. 2, 98 Stat. 1837, 1987 (1984) (codified as amended at 18 U.S.C. §§ 3551-3673 (1988); 28 U.S.C. §§ 991-998 (1988)).

94. Pub. L. No. 98-473, tit. 2, 98 Stat. 1837, 1976 (1984).

95. S. REP. NO. 225, 98th Cong., 1st Sess. 37, 38-39, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3220, 3221-22 (footnotes omitted).

> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
> (B) to afford adequate deterrence to criminal conduct;
> (C) to protect the public from further crimes of the defendant; and
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner[.][96]

Defendants are to be sentenced so as to achieve each of these purposes "to the extent that they are applicable in light of all the circumstances of the case."[97]

In passing the Sentencing Reform Act, Congress determined that the achievement of these purposes, as well as correction of the perceived faults of the traditional system of sentencing, could be best accomplished through the establishment of an entity with the mandate to develop policy statements and sentencing guidelines that are to govern the imposition of sentence upon a broad range of federal defendants.[98] Thus, the Sentencing Commission was born.

Congress instructed the Sentencing Commission to promulgate guidelines for courts to use in imposing appropriate sentences.[99] The Guidelines were to address (1) whether probation, a fine, or term of imprisonment should be imposed; (2) what the appropriate amount of a fine or length of a term of probation or imprisonment is; (3) whether a term of imprisonment should also include a post-imprisonment term of supervised release and what that term of supervised release should be; and (4) whether multiple sentences should run concurrently or consecutively.[100] Congress further instructed the Sentencing Commission to develop general policy statements regarding ap-

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96. 18 U.S.C. § 3553(a)(2)(A)-(D) (1988).

97. *Id.* § 3551(a).

98. *See* S. REP. No. 225, 98th Cong., 1st Sess., 37, 63-64, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3220, 3246-47.

99. *See* 28 U.S.C. § 994(a) (1988).

100. *See id.* § 994(a)(1)(A)-(D). The Sentencing Reform Act, it should be noted, abolished parole and created the concept of "supervised release" for persons convicted of crimes committed after the Act's effective date. 1990 REPORT OF THE FEDERAL COURTS STUDY COMM. 64 (1990). Additionally, the Act sharply curtailed the availability of good behavior time credits. *See* S. REP. No. 225, 98th Cong. 1st Sess., 37, 57, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3220, 3240. Therefore, a defendant's sentence under the Guidelines accurately corresponds to the time he will actually serve. Under the prior sentencing system, a defendant

plication of the Guidelines and other aspects of sentencing that would further the purposes of sentencing.[101]

Congress by no means left the Sentencing Commission to its own devices concerning the nature of the Guidelines and the basic form they should take. To the contrary, Congress placed some rather precise limitations on the Sentencing Commission's authority. For instance, if the sentence directed by the Guidelines includes a prison term, "the maximum of the range established for such a term shall not exceed the minimum of that range by more than the greater of 25 percent or 6 months, except that, if the minimum term of the range is 30 years or more, the maximum may be life imprisonment."[102] Congress also required that in its establishment of offense categories the Sentencing Commission was to consider certain specified factors and judge their relevance to determinations of appropriate sentencing.[103] Moreover, Congress specifically required the Sentencing Commission to establish Guidelines requiring terms of imprisonment at or near the maximum authorized by statute[104] for certain repeat offenders convicted of violent or particular drug-related crimes,[105] and substantial terms of imprisonment for a variety of other delineated categories of offenses.[106] Furthermore, Congress stressed that the Guidelines could not alter the maximum terms of imprisonment author-

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would qualify for parole release after serving one-third of his actual sentence. *See id.* at 40, *reprinted in* 1984 U.S. CODE & CONG. & ADMIN. NEWS 3220, 3223.

101. *See* 28 U.S.C. § 994(a)(2) (1988). Additionally, Congress directed the Sentencing Commission to issue guidelines or policy statements "regarding the appropriate use of the provisions for revocation of probation . . . [and] for modification of the term and conditions of supervised release and revocation of supervised release . . . ." 28 U.S.C. § 994(a)(3) (1988).

102. 28 U.S.C. § 994(b)(2) (1988).

103. *See id.* § 994(c), (d). In establishing these categories, the Commission was mandated to consider such factors "only to the extent that they [did] have relevance . . . ." *Id.* § 994(c); *see also id.* § 994(e) ("The Commission shall assure that the guidelines and policy statements, in recommending a term of imprisonment or length of a term of imprisonment, reflect the general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant."); GUIDELINES MANUAL, *supra* note 1, §§ 5H1.1 to .2, at 5.35, 5H1.5 to .6, at 5.36.

104. *See* GUIDELINES MANUAL, *supra* note 1, § 4B1.1 commentary, at 4.11.

105. *See* 28 U.S.C. § 994(h) (1988).

106. *See id.* § 994(i).

ized under law and had to be consistent with all pertinent provisions of Title 18 of the United States Code.[107]

The Sentencing Reform Act gives effect to the Guidelines that it created the Sentencing Commission to promulgate, by, for the first time, providing judges with detailed instructions as to the method by which sentence is to be imposed and the matters which the judge is to take into consideration in determining a defendant's sentence.[108] The judge is to impose a sentence of the kind and within the range the Guidelines establish except where no applicable sentencing guideline has been promulgated for a given offense or type of offender, or where the court finds that departure from the applicable Guideline is warranted because of the existence of aggravating or mitigating circumstances that the Sentencing Commission failed adequately to consider when formulating the Guidelines.[109]

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107. *See id.* § 994(b)(1); *see also* S. REP. No. 225, 98th Cong., 1st Sess. 37, 51, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3220, 3234.

108. The Sentencing Reform Act directs that in imposing sentence, judges "shall consider":

(1) "the nature and circumstances of the offense and the history and characteristics of the defendant";

(2) the need for the sentence imposed to serve the purposes of the Act;

(3) "the kinds of sentences available";

(4) "the kinds of sentence and the sentencing range established for the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines . . . and that are in effect on the date the defendant is sentenced";

(5) "any pertinent policy statement issued by the Sentencing Commission . . . that is in effect on the date the defendant is sentenced";

(6) "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct"; and

(7) "the need to provide restitution to any victims of the offense."

18 U.S.C. § 3553(a) (1988).

109. *Id.* § 3553(b). Congress intended, however, that even where a judge concludes that no sentencing guideline covers a given situation, or that departure from the sentencing range set forth in the Guidelines is warranted, the purposes of sentencing enumerated in the Act would control and the policy statements developed by the Sentencing Commission are to be given substantial weight in making sentencing determinations consistent with the aims of the legislation. *See* S. REP. No. 225, 98th Cong., 1st Sess. 37, 51-56, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3220, 3234-39. Indeed, 18 U.S.C. § 3553(b) states:

In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines appli-

The sentencing judge, moreover, must state in open court the reasons for her imposition of a particular sentence, and, if such sentence exceeds twenty-four months and is of the kind and within the range prescribed by the Guidelines, she must include the reasons for sentencing the defendant to a particular point within the applicable sentencing range under the Guidelines.[110] Where the judge imposes a sentence outside that normally available under the Guidelines, she must indicate the specific reason for doing so.[111] Furthermore, the judge's authority to impose a sentence below the statutory minimum is restricted to where the government has moved the court to do so "to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense."[112] Even where this is the case, the sentence to be imposed must comport with the Guidelines and policy statements the Sentencing Commission has promulgated.[113]

While tightly reining in the "unfettered discretion" that judges had previously enjoyed in exercising their sentencing power, the Sentencing Reform Act did not completely eliminate all judicial discretion in sentencing. As has been noted above,[114] judges possess the ability to choose from within a range of possible sentences available under the applicable Guideline. Additionally, judges may depart from the sentencing range mandated by the Guidelines in appropriate cases

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cable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

18 U.S.C. § 3553(b) (1988).

The legislative history of the Sentencing Reform Act makes clear, moreover, that Congress sought to assure that most cases will result in a sentence falling within the range set by the Guidelines and that sentences outside of the Guidelines sentencing range will be imposed only in situations where such deviation is appropriate. *See* S. REP. NO. 225, 98th Cong., 1st Sess. 37, 52, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3220, 3235.

110. *See* 18 U.S.C. § 3553(c) (1988).

111. *Id.* Additionally, if the judge orders no restitution or only partial restitution, she must give a reason for doing so. *Id.*

112. *Id.* § 3553(e). "Statutory minimum" means the minimum sentence set forth in the United States Code, as opposed to the minimum normally available under the Guidelines sentencing range applicable to the case.

113. *Id.*

114. *See supra* text accompanying notes 109-10.

and, indeed, have an obligation to do so where a particular situation calls for such a result.[115] Furthermore, the well-established statutory proviso that "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence[,]"[116] remains unaltered.[117] As Congress put it: "The sentencing guidelines system will not remove all of the judge's sentencing discretion. Instead, it will guide the judge in making his decision on the appropriate sentence."[118]

B. The Guidelines

In compliance with its mandate under the Sentencing Reform Act,[119] the Sentencing Commission sent its initial set of sentencing guidelines, policy statements, and accompanying material to Congress on April 13, 1987.[120] These Guidelines

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115. As expressed in the Report of the United States Senate Committee on the Judiciary:

> The Committee does not intend that the guidelines be imposed in a mechanistic fashion. It believes that the sentencing judge has an obligation to consider all the relevant factors in a case and to impose a sentence outside the guidelines in an appropriate case. The purpose of the sentencing guidelines is to provide a structure for evaluating the fairness and appropriateness of the sentence for an individual offender, not to eliminate the thoughtful imposition of individualized sentences.

S. REP. NO. 225, 98th Cong., 1st Sess. 37, 52, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3220, 3235.

116. 18 U.S.C. § 3661 (1988).

117. Originally enacted as part of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 951 (1970), this provision was codified at 18 U.S.C. § 3577. As a result of the Sentencing Reform Act, this section was renumbered and now appears, otherwise unaltered, at 18 U.S.C. § 3661 (1988).

118. S. REP. NO. 225, 98th Cong., 1st Sess. 37, 51, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3220, 3234. The Senate Report continues: "If the judge finds an aggravating or mitigating circumstance present in the case that was not adequately considered in the formulation of the guidelines and that should result in a sentence different from that recommended in the guidelines, the judge may sentence the defendant outside the guidelines." *Id.* at 51-52, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3220, 3234-35.

119. *See* Pub. L. No. 98-473, tit. 2, ch. 2, 98 Stat. 1837, 2031 (1984).

120. Congress's intent in the Sentencing Reform Act was to have the Sentencing Commission submit the initial sentencing guidelines within 18 months of the Act's

took effect, as envisioned by the statute, on November 1, 1987 after Congress had an opportunity to consider the Sentencing Commission's handiwork.[121] As the Sentencing Reform Act also instructed, the Sentencing Commission has continued with its tasks since 1987 and has promulgated a number of amendments to the initial Guidelines.[122]

The Sentencing Commission perceived Congress to have had three fundamental objectives in enacting the Sentencing Reform Act, an understanding of which is essential to comprehension of the Guidelines and the rationale that underlies them. First, Congress sought honesty in sentencing, *i.e.*, a system in which the sentence imposed bears a direct and close relationship to time actually served.[123] Second, Congress sought uniformity in sentencing through the narrowing of disparities in the sentences handed down for similar conduct by similar offenders.[124] Third, Congress sought proportionality in sentencing through the development of a system in which appropriate sentences are imposed for criminal conduct of differing degrees of severity.[125] Each of these objectives, in the view of the Sentencing Commission, served the even more basic con-

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October 12, 1984 date of enactment. S. REP. 225, 98th Cong., 1st Sess., 37, 188, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3220, 3371. Congress subsequently extended the deadline for submission of the initial set of Guidelines to April 13, 1987. Sentencing Reform Amendments Act of 1985, Pub. L. No. 99-217, 99 Stat. 1728 (codified as amended at 18 U.S.C. § 3551 (1988)).

121. *See* United States Sentencing Commission, *Sentencing Guidelines for United States Courts*, 52 Fed. Reg. 18,046 (1987), which states, "The law provides for a six-calendar-month period of Congressional review and examination commencing with submission of the guidelines to Congress on April 13, 1987. . . . [U]nless by law Congress modifies, postpones, or rejects them, the guidelines become effective on November 1, 1987." *Id.*

122. *See* GUIDELINES MANUAL, *supra* note 1, app. C; UNITED STATES SENTENCING COMMISSION, FEDERAL SENTENCING GUIDELINES MANUAL app. C (1988). The Sentencing Commission itself declared its initial Guidelines to be "but the first step in an evolutionary process." UNITED STATES SENTENCING COMMISSION, FEDERAL SENTENCING GUIDELINES MANUAL § 1A3, at 1.4 (1988).

123. It is the furthering of this objective that was the basic impetus of the Sentencing Reform Act's abolition of parole. *See supra* note 95 and accompanying text; *see generally* GUIDELINES MANUAL, *supra* note 1, § 1A3, at 1.2-.4.

124. *See* S. REP. NO. 225, 98th Cong., 1st Sess., 37, 161, *reprinted in* U.S. CODE CONG. & ADMIN. NEWS 3220, 3344; GUIDELINES MANUAL, *supra* note 1, § 1A3, at 1.2-.4.

125. *See supra* note 95 and accompanying text.

gressional goal of enhancing the ability of the criminal justice system to reduce crime through an effective, yet fair, sentencing system.[126]

The Guidelines, which sought to cover approximately ninety percent of all cases in the federal courts,[127] are resultantly rather extensive.[128] The Guidelines establish fully nineteen separate categories of offense conduct, each with its own multiplicity of subcategories.[129] The Guidelines, moreover, contain detailed instructions concerning the effect on sentencing of, for instance, a defendant's criminal history,[130] the presence of multiple counts in an indictment[131] or a plea agreement,[132] and such circumstances as the defendant's role in an offense,[133] the acceptance of responsibility by the defendant,[134] and the nature of the victim.[135] The Guidelines also contain sections on such matters as sentencing procedures[136] and violations of probation or supervised release.[137] Additionally, as is discussed more fully below, the Guidelines attempt to delineate the general circumstances where departure from the sentencing range prescribed by the Guidelines may be appropriate.[138]

Nonetheless, the principles and procedures that underlie the application of the Guidelines to an ordinary case are, at least in broad outline, fairly straightforward. The Guidelines set

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126. *See* GUIDELINES MANUAL, *supra* note 1, § 1A3, at 1.2.

127. *See id.* § 1A5, at 1.11.

128. A detailed discussion of the Guidelines' intricacies is beyond the scope of this Article. Instead, the provisions of the Guidelines will be set forth only in a broad outline to the extent necessary to understand the issues that arise concerning their interaction with the exclusionary rule.

129. The Sentencing Commission left seven parts in the offense conduct chapter non-designated, for the incorporation of future amendments, but has not added any new categories of offense conduct since the original promulgation of the Guidelines. *See* GUIDELINES MANUAL, *supra* note 1, at XXXIII-XXXV.

130. *See id.* § 4A1.1, at 4.1.

131. *See id.* § 3D1.1 to .5 and introductory commentary, at 3.11-.21.

132. *See id.* § 6B1.1 to .4 and introductory commentary, at 6.5-.8.

133. *See id.* § 3B1.1 to .4, at 3.5-.7.

134. *See id.* § 3E1.1, at 3.23.

135. *See id.* § 3A1.1 to .3, at 3.1-.3.

136. *See id.* § 6A1.1 to .3 and introductory commentary, at 6.1-.3.

137. *See id.* § 7A1.1 to .4, at 7.1-.2.

138. *See id.* §§ 5K1.1 to 5K2.15, at 5.41-.47. *See also infra* notes 150-56 and accompanying text.

forth a step-by-step approach that is to be followed for determining the "offense level" of the crime committed, the defendant's criminal history, the guideline range that corresponds to the offense level and the defendant's criminal history category, the sentencing requirements and other options related to the particular Guideline range, and any special factors that might warrant consideration in imposing sentence.[139] A numerical base offense level is assigned to each type of offense conduct.[140] Additionally, each offense may have one or more "special offense characteristics" that, where present, result in either an increase or decrease in the numerical value associated with the

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139. *See* GUIDELINES MANUAL, *supra* note 1, § 1B1.1 to .10, at 1.13-.26. Section 1B1.1 provides application instructions stating:

> (a) Determine the applicable offense guideline section from Chapter Two. *See* §1B1.2 (Applicable Guidelines). The Statutory Index (Appendix A) provides a listing to assist in this determination.
>
> (b)Determine the base offense level and apply any appropriate specific offense characteristics contained in the particular guideline in Chapter Two in the order listed.
>
> (c)Apply the adjustments as appropriate related to victim, role, and obstruction of justice from Parts A, B, and C of Chapter Three.
>
> (d) If there are multiple counts of conviction, repeat steps (a) through (c) for each count. Apply Part D of Chapter Three to group the various counts and adjust the offense level accordingly.
>
> (e) Apply the adjustment as appropriate for the defendant's acceptance of responsibility from Part E of Chapter Three.
>
> (f)Determine the defendant's criminal history category as specified in Part A of Chapter Four. Determine from Part B of Chapter Four any other applicable adjustments.
>
> (g)Determine the guideline range in Part A of Chapter Five that corresponds to the offense level and criminal history category determined above.
>
> (h)For the particular guideline range, determine from Parts B through G of Chapter Five the sentencing requirements and options related to probation, imprisonment, supervision conditions, fines, and restitution.
>
> (i)Refer to Parts H and K of Chapter Five, Specific Offender Characteristics and Departures, and to any other policy statements or commentary in the guidelines that might warrant consideration in imposing sentence.

Id.

140. *See id.* ch. 2 introductory commentary, at 2.1.

offense.[141] Numerical values are also assigned to defendants based on their criminal history.[142]

At the heart of the Guidelines lies the "sentencing table,"[143] which is the lead item in a comprehensive chapter on the procedure which judges are to utilize in determining the type of sentence to impose and, where imprisonment is ordered, the duration of incarceration.[144] The sentencing table is not particularly complex. The vertical axis lists forty-three offense levels. The horizontal axis lists six groupings of criminal history categories. The sentencing range that is given to a particular case is, quite simply, the intersection between the offense level and criminal history category. Each sentencing range sets forth, in months, the possible periods of incarceration that the judge may, in his discretion, impose.[145]

Significantly, citing and using words that deliberately restate the essence of the basic statutory principle proscribing the placement of limitations on the information that a judge may consider in imposing sentence,[146] the Guidelines explicitly provide that in determining both the applicable sentencing range within which a given case should fall and whether departure from the applicable sentencing range is warranted, "the court may consider, without limitation, any information concerning the background, character and conduct of the defendant, un-

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141. *See generally id.* For example, the Guidelines establish a base offense level of sixteen for "renting or managing a drug establishment." If, however, the defendant possessed a firearm or other dangerous weapon during commission of a crime falling within the offense conduct of renting or managing a drug establishment, the offense is to be increased to eighteen. *See id.* § 2D1.8, at 2.55. Additionally, for certain offense conduct, the base offense level varies depending upon the circumstances involved in the commission of such conduct. For example, the base offense level for "involuntary manslaughter" is ten if the conduct underlying the offense was "criminally negligent," while the base offense level for involuntary manslaughter is fourteen if the conduct underlying the offense was "reckless." *See id.* § 2A1.4, at 2.4-.5.

142. *See id.* § 4A1.1 to .3, at 4.1-.10.

143. *Id.* § 5A, at 5.2.

144. *See id.* §§ 5B1.1 to 5K2.15, at 5.5-.47.

145. At the highest offense level listed on the sentencing table, forty-three, the sentence is to be life imprisonment rather than a range set forth in months. *See id.* § 5A, at 5.2.

146. *See supra* text accompanying notes 89-91.

less otherwise prohibited by law. *See* 18 U.S.C. § 3661."[147] The Sentencing Commission's official commentary to the Guidelines makes clear its view that Congress's recodification in 1984 of the statutory provision embodying the "no limitation" rule leaves no doubt that Congress intended it to apply to the future Guidelines sentencing system and that, in choosing a sentence within the applicable sentencing range or deciding to depart from that range, a court is not precluded from considering information that the Guidelines do not take into account.[148] The Sentencing Commission stressed, however, that the court's authority to consider such information is justified only once the applicable sentencing range has been determined pursuant to the procedures the Guidelines lay out.[149]

The matter of departures from the sentencing range calculated under the procedures the Guidelines establish was — and remains — a thorny issue for the Sentencing Commission and courts attempting to implement and interpret the Guidelines system. On the one hand, should departures from sentencing ranges become routine, the curtailment of discretion and uniformity after which Congress and the Sentencing Commission have quested would be no more than illusory. On the other hand, it was the intention of the Guidelines system,[150] and a requisite of any system of individualized sentencing, that flexibility to take into account unusual or unanticipated circumstances be built into the sentencing procedures.

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147. GUIDELINES MANUAL, *supra* note 1, § 1B1.4, at 1.21.

148. *See id.* § 1B1.4 commentary, at 1.21-.22. The Sentencing Commission, however, did note that under the Guidelines certain factors should either not be considered at all, or considered only for a limited purpose. *Id.* Such factors include age, education and vocational skills, mental and emotional conditions, and previous employment. *See id.* § 5H1.1 to .10, at 5.35-.37; *see also supra* note 103 and accompanying text.

149. *See id.* § 1B1.4, at 1.13 (Application Instructions). As Hutchison and Yellen note, Guideline § 1B1.4

> does not address what the court can consider in determining the applicable guideline range, which is addressed by the relevant conduct guideline (§ 1B1.3). This guideline applies once the applicable guideline range is determined and the court is considering where within that range to sentence or whether, and how far, to depart from that range.

HUTCHISON & YELLEN, *supra* note 7, at 42.

150. *See supra* notes 114-18 and accompanying text.

Congress attempted to reconcile these competing considerations by allowing the imposition of a sentence outside the range mandated by the Guidelines where the court finds, to quote the language of section 3553(b) of the Sentencing Reform Act, "that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines. . . ."[151] Hutchison and Yellen describe the process mandated by section 3553(b) as follows:

> Section 3553(b) requires a court to make 4 determinations before departing from the guidelines. First, the court must determine whether there is an aggravating or mitigating factor present in the case. Next the court must determine if the guidelines take account of that factor.
>
> If the court determines that the guidelines do take account of the factor, then the court must address the next determination, whether the guidelines adequately account for the factor. If the guidelines adequately take account of the factor, the court cannot depart.
>
> If the court determines that the guidelines do not take account of the factor, then the court's determination of the adequacy issue should be easy. If the guidelines do not account for the factor at all, then, *a fortiori*, the guidelines do not *adequately* account for the factor.
>
> Finally, if the court determines that the guidelines do not adequately account for the factor, the court must determine whether the presence of the factor should result in a sentence different from that called for by the guidelines. If the court determines that the factor calls for a sentence different from the guidelines sentence, then the court can depart from the guidelines.[152]

The Sentencing Commission set forth in the Guidelines a variety of factors that it considered material to a judge's decision as to whether departure from the Guidelines is appropriate.[153] The Sentencing Commission recognized, however, that the

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151. 18 U.S.C. § 3553(b) (1988).

152. HUTCHISON & YELLEN, *supra* note 7, at 386-87 annot. 5 (footnote omitted) (emphasis in original).

153. *See* GUIDELINES MANUAL, *supra* note 1, §§ 5K1.1 to 5K2.15, at 5.41-.47. Departures may be granted on the basis of substantial assistance to the authorities, refusal to assist, death, physical injury, extreme psychological injury, abduction or unlawful restraint, property damage or loss, weapons and dangerous instrumentalities, disruption of governmental function, extreme conduct, criminal purpose, victim's conduct, lesser harms, coercion and duress, diminished capacity, public welfare, and terrorism. *Id. See also* 18 U.S.C. § 3553(b), (e) (1988); 28 U.S.C. § 994(n) (1988).

"[c]ircumstances that may warrant departure from the guidelines . . . cannot, by their very nature, be comprehensively listed and analyzed in advance"[154] and that the list of factors the Guidelines contain are not exhaustive.[155] Thus, ultimately the decision as to whether departure is warranted in a given case has — within the contours shaped by Congress and the Sentencing Commission's proclamations — been left to the judgment of the courts.[156]

IV. EFFECT OF CONSIDERATION OF ILLEGALLY OBTAINED EVIDENCE ON SENTENCING UNDER THE GUIDELINES

The Sentencing Reform Act, its legislative history, and the Guidelines themselves are each completely devoid of any mention of the effect that illegally obtained evidence should, or should not, have on sentencing. This oversight is completely understandable: Congress and the Sentencing Commission were focusing their efforts on reforming and restructuring the federal sentencing system on a grand scale. A myriad of issues inevitably would, even if contemplated, have to wait for another day for resolution.

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154. GUIDELINES MANUAL, *supra* note 1, § 5K2.0, at 5.42.

155. *See id.* § 1A4(b), at 1.6-.7.

156. Given the vagueness inherent in the determination of when departures from the Guidelines are appropriate, it is not surprising that the propriety of departures from the applicable sentencing range in given circumstances has been the subject of a fair number of cases in each of the circuits. *See, e.g.*, United States v. Chase, 894 F.2d 488 (1st Cir. 1990); United States v. Adeniyi, 912 F.2d 615 (2d Cir. 1990); United States v. Kikumura, 918 F.2d 1084 (3d Cir. 1990); United States v. Martin, 917 F.2d 1302 (4th Cir. 1990); United States v. Mourning, 914 F.2d 699 (5th Cir. 1990); United States v. Dumas, 921 F.2d 650 (6th Cir. 1990); United States v. Scott, 914 F.2d 959 (7th Cir. 1990); United States v. Whitehorse, 909 F.2d 316 (8th Cir. 1990); United States v. Todd, 909 F.2d 395 (9th Cir. 1990); United States v. Whitehead, 912 F.2d 448 (10th Cir. 1990); United States v. Russel, 917 F.2d 512 (11th Cir. 1990); United States v. Ortez, 902 F.2d 61 (D.C. Cir. 1990).

The most recent figures indicate that approximately 18% of sentences imposed under the Guidelines system involved departures from the Guidelines sentencing range. 1989 UNITED STATES SENTENCING COMM'N ANN. REP. 47-51. Of these cases, 5.8% involved downward departures resulting from the defendant's sustantial assistance to the government; 8.7% involved downward departures for other reasons; and 3.5% involved upward departures for various reasons. *Id.*

The failure to address what part evidence obtained in violation of the fourth amendment should play in sentencing determinations is nonetheless unfortunate. The pre-Guidelines case law on the relationship between the exclusionary rule and sentencing proceedings holds that the ultimate determination of the role that illegally obtained evidence should have in the imposition of sentence in a particular case is, as a general matter, to be left to the discretion of the individual sentencing judge. The premise of such a conclusion bears scrutiny in light of the anti-discretion impetus for and import of the Guidelines system.

Moreover, the decision as to whether to consider illegally obtained evidence will, because of the structure of the Guidelines themselves, ofttimes be a significant factor in the determination of an appropriate sentence. Under the traditional system, a judge could use his discretion not only in deciding whether to allow illegally obtained evidence to be placed before him at sentencing, but also in determining how much weight, if any, such evidence should have upon his subjective calculation of the sentence to be imposed.[157] The introduction of illegally obtained evidence takes on an entirely new dimension in the Guidelines system. Under the Guidelines, the decision as to whether or not to factor such evidence into the sentencing equation may, if given its full effect, entail a significant difference in offense level, with the concomitant effect upon the available sentencing range that changes in offense level carry with them.

Consider the following illustrative example: Mr. A is arrested in a store for passing counterfeit currency in violation of 18 U.S.C. § 472.[158] During a lawful search incident to the arrest, federal agents discover that Mr. A has in his possession

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157. *See supra* notes 37-88 and accompanying text.

158. 18 U.S.C. § 472 (1988) concerns the utterance of counterfeit obligations or securities, and provides:

> Whoever, with intent to defraud, passes, utters, publishes, or sells, or attempts to pass, utter, publish, or sell, or with like intent brings into the United States or keeps in possession or conceals any falsely made, forged, counterfeited, or altered obligation or other security of the United States, shall be fined not more than $5,000 or imprisoned not more than fifteen years, or both.

18 U.S.C. § 472 (1988).

counterfeit federal reserve notes with a total face value of $200. The agents then drive to Mr. A's home where, without first obtaining a search warrant and absent any circumstances which would obviate the need for a warrant (such as consent or "exigent circumstances"),[159] proceed to conduct a thorough search of the home. The fruits of this illegal search include counterfeit federal reserve notes with a face value totalling $30,000 and plates and printing equipment which constitute devices used for counterfeiting.

The applicable guideline for violation of 18 U.S.C. § 472 is Guideline section 2B5.1, which establishes a base offense level of nine for offenses involving counterfeit bearer obligations of the United States.[160] Section 2B5.1 also sets forth "special offense characteristics," the presence of which results in an increase in the offense level.[161] Section 2B5.1(b)(1) instructs, "If the face value of the counterfeit items exceeded $2,000, increase by the corresponding number of levels from the table at section 2F1.1 (Fraud and Deceit)."[162] Section 2F1.1, in turn, requires that where the relevant amount is over $20,000 and below $40,000 the offense level is to be increased by four.[163] Section 2B5.1 further provides that "[i]f the defendant manufactured or produced any counterfeit obligation or security of the United States, or possessed or had custody of or control over a counterfeiting device or materials used for counterfeiting, and the offense level as determined above is less than **15**, increase to **15**."[164]

If it is assumed that no additional adjustments to the offense level are applicable to Mr. A's case,[165] and that this is Mr. A's

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159. *See, e.g.*, Johnson v. United States, 333 U.S. 15 (1947) (search without warrant demands exceptional circumstances such as a suspect fleeing or likely to take flight, or threatened removal or destruction of evidence).

160. GUIDELINES MANUAL, *supra* note 1, § 2B5.1(a), at 2.30.

161. *Id.* § 2B5.1(b).

162. *Id.* § 2B5.1(b)(1).

163. *Id.* § 2F1.1, at 2.71.

164. *Id.* § 2B5.1(b)(2), at 2.30 (emphasis in original).

165. *See generally id.* §§ 3A1.1 to 3E1.1, at 3.1-.24 (providing for adjustments to offense level for, *inter alia*, defendant's aggravating or mitigating role in the offense, abuse of position of trust or use of special skill, and willful obstruction or impeding of proceedings).

first offense and he therefore falls within criminal history category I,[166] should the evidence unlawfully obtained from Mr. A's home be excluded from consideration in his sentencing, his offense level would be nine and the sentence which he would be ordered to serve would, absent a departure from the Guidelines, necessarily fall within the range specified by the intersection of offense level nine and criminal history category I. The sentencing range for that intersection is between four and ten months.[167] On the other hand, should the fruits of the search be included in the calculations under the Guidelines, the offense level would increase to thirteen under sections 2B5.1(b)(1) and 2F1.1 as a result of the discovery of the additional $30,000 in counterfeit bills in Mr. A's home and increase yet again to fifteen due to the presence of the plates and printing equipment found in the house.[168] An offense level of fifteen, when coordinated with a criminal history category of I, yields a sentencing range of eighteen to twenty-four months.[169]

The effect of the decision as to whether or not to consider the evidence obtained from Mr. A's home in contravention of the fourth amendment is, therefore, a significant one. Inclusion of this evidence in the calculations under the Guidelines results in a 350 percent increase in the minimum sentence available and more than doubles the maximum sentence to which Mr. A is subject.

Moreover, the Guidelines state that where the minimum term of imprisonment provided by the applicable guideline range is from one to six months, the court can impose a sentence of probation on the condition that at least the minimum term of the Guidelines range be served in a halfway house.[170] Therefore, were Mr. A's case to be assigned an offense level of nine, the judge would have the option to sentence Mr. A to probation and order that he spend at least four months in a

166. *See* GUIDELINES MANUAL, *supra* note 1, § 4A1.1, at 4.1; *see also supra* notes 144-45 and accompanying text.

167. *See* GUIDELINES MANUAL, *supra* note 1, § 5A, at 5.2; *see also supra* notes 143-45 and accompanying text.

168. *See supra* notes 161-64 and accompanying text.

169. *See* GUIDELINES MANUAL, *supra* note 1, § 5A, at 5.2.

170. *See id.* §§ 5B1.1(a)(2), at 5.5, 5C1.1(c)(2), (e)(2), at 5.11.

halfway house. Additionally, where the minimum term under the applicable guideline range is between one and six months the court also has the option of ordering a "split sentence" whereby up to half the minimum term can be served through community confinement or home detention so long as the balance of the term is satisfied by imprisonment.[171] Factoring the illegal evidence into the Guidelines equation and thereby increasing the offense level to fifteen would eliminate any possibility of probation, community confinement, or home detention and require that Mr. A be sentenced to at least a year and a half of hard jail time.[172]

The magnitude of this impact is troubling, especially in light of the pre-Guidelines case law regarding the use of illegally seized evidence at sentencing. That case law accorded judges substantial discretion as to whether to consider or ignore such evidence in their imposition of sentence. The Sentencing Reform Act and the Guidelines, however, make clear that such a degree of discretion is unacceptable, particularly where its exercise could undermine the efforts of Congress and the Sentencing Commission to assure that similarly situated defendants are treated in similar fashion. It is important that, if the Guidelines' goal of establishing discernible standards that are to govern sentencing is to be achieved, a consistent approach must be established regarding the treatment of evidence that under the Guidelines often bears directly and significantly upon the duration of the sentence that a defendant will actually be ordered to serve.

171. *Id.* § 5C1.1(c)-(e), at 5.11.

172. *See id.* § 5C1.1(f), at 5.11. While our example involves the length of incarceration and eligibility for probation or a split sentence, the decision as to whether to include illegally obtained evidence in Guidelines calculations will often have a similar effect on other sentencing options that are in various circumstances available under the Guidelines, such as imposition of a fine or a term of supervised release. *See id.* §§ 5D1.1 to .2, at 5.15, 5E1.2(c), at 5.18 -.19.

V. PROPOSED TREATMENT OF ILLEGALLY OBTAINED EVIDENCE AT SENTENCING UNDER THE GUIDELINES

In many cases, a judge preparing to sentence a defendant against whom evidence has been obtained in violation of the fourth amendment quickly reaches the point beyond which he cannot proceed without resolving what role the illegally obtained evidence will play in the determination of the sentence. As is illustrated above,[173] one often cannot calculate the offense level that is to govern sentencing without first deciding whether or not to include the illegally obtained evidence in the calculation.[174] This situation can be approached in several different ways.

A. Prohibition of Consideration

One possible approach to the handling at sentencing of evidence obtained in violation of the fourth amendment is simply to prohibit its consideration. Thus, to return to our example,[175] the judge would have no option but to assign an offense level of nine and sentence Mr. A to a term of imprisonment falling between four and ten months.[176] Such a blanket rule barring judges from factoring illegally obtained evidence into Guidelines calculations, using knowledge of such evidence as a basis for choosing a sentence of a particular duration within a sentencing range, or relying on the evidence as justification to depart from a sentencing range comports well with the Sentencing Reform Act and the Sentencing Commission's efforts to

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173. *See supra* text accompanying notes 158-72.

174. The offense level to be assigned to many of the crimes which the Guidelines cover depends on factors such as the amount of contraband—for instance, drugs, stolen property, or counterfeit currency—involved in the commission of the crime. The offense level often additionally depends on the manner in which the crime was committed, for example, whether a gun was involved. It is in these situations that the offense level cannot be established without first determining whether the illegally obtained evidence should be deemed relevant to the calculation of the offense level.

175. *See supra* notes 158-72 and accompanying text.

176. *See supra* notes 166-67 and accompanying text.

control judicial discretion in sentencing. This approach, however, has little else to speak for it.

To begin with, wholesale prohibition of illegally obtained evidence from consideration in sentencing would constitute a complete reversal of pre-Guidelines law.[177] While, as has been noted above,[178] there is nothing in the Sentencing Reform Act or the Guidelines addressing the role that illegally obtained evidence should play under the Guidelines system, there is likewise absolutely nothing that even hints at the idea that substantive pre-Guidelines law analyzing the scope of a constitutionally-derived remedy such as the exclusionary rule may be completely disregarded.

Second, although the bottom line of the pre-Guidelines law was that judges may, absent egregious circumstances, exercise discretion in determining the part that illegally obtained evidence should have in sentencing decisions in particular cases, the rule that such evidence might properly be considered without running afoul of constitutionally-based principles was by no means the result of blind deference to the traditional broad discretion of judges in sentencing matters. While cases such as *Lee*[179] and *Graves*[180] took cognizance of such judicial discretion and ultimately declined to interfere with it, they did so only upon undertaking the broad balancing test mandated by *Calandra*. These decisions concluded, fundamentally, that the purpose of deterrence that the exclusionary rule is designed to serve would not be meaningfully advanced by application of the rule to sentencing proceedings. The courts' analyses under *Calandra* of the costs and benefits associated with application of the exclusionary rule to sentencing are essentially unaffected by the implementation of the Guidelines system.[181]

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177. *See supra* notes 37-88 and accompanying text.

178. *See supra* text accompanying note 157.

179. United States v. Lee, 540 F.2d 1205 (4th Cir.), *cert. denied*, 429 U.S. 894 (1976).

180. United States v. Graves, 785 F.2d 870 (10th Cir. 1986).

181. The implementation of the Guidelines system has, however, increased the effect that the actions of law enforcement officials may have on the sentence ultimately imposed on a defendant. *See infra* note 207 and accompanying text.

Third, such a curtailment upon the information that may be considered in sentencing would contravene the purposes of the Guidelines. Withholding from courts' consideration information inarguably pertinent to the nature of a defendant and the activities in which he has engaged stands in the way of meaningful assessment of the defendant and his conduct and their similarity to other defendants and crimes. Indeed, the Guidelines explicitly declare to be conduct relevant to determination of the sentencing range:

> *[A]ll* acts and omissions committed or aided and abetted by the defendant, or for which the defendant would be otherwise accountable, that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense, or that otherwise were in furtherance of that offense[.][182]

The Guidelines, moreover, directly incorporate the established rule that courts are not to be limited in the information bearing upon a defendant's background, character, or conduct that they may consider in imposing sentence.[183] The Guidelines thereby seek to achieve sentences based not simply on the technicalities of the specific crime with which a defendant has been charged, but also on all the relevant conduct that indicates what the defendant actually did. The barring of consideration of relevant though unlawfully obtained evidence would run directly counter to these efforts.

Furthermore, the Guidelines do not seek to rein in the exercise of judicial discretion for the sake merely of doing so. Rather, checks are placed on judicial decision-making solely as a means to the end of reducing unwarranted disparities in the sentencing of defendants with similar records who have engaged in similar conduct and maintaining justifiable distinc-

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182. GUIDELINES MANUAL, *supra* note 1, § 1B1.3, at 1.18 (emphasis added). Furthermore, the Sentencing Commission's commentary to this Guideline adds that even conduct that is not formally charged or is not an element of the offense for which a defendant has been convicted may be relevant to determination of the applicable sentencing range. *See id.* at commentary.

183. *See* 18 U.S.C. § 3661 (1988); GUIDELINES MANUAL, *supra* note 1, § 1B1.4, at 1.21. *See also supra* notes 90, 146-47 and accompanying text. Not insignificantly, the pre-Guidelines cases also stressed Congress's prohibition against constraints being placed upon the information judges may consider at sentencing.

tions in the sentences imposed on defendants who have engaged in dissimilar behavior.

Consider, for instance, the following situation: Suppose that Mr. X is arrested and searched incident to arrest under the same circumstances as our hypothetical Mr. A.[184] After his arrest, however, Mr. X consents to a search of his home. During the course of the search, the agents find an additional $30,000 in counterfeit federal reserve notes but no plates or printing equipment. Mr. Y likewise is arrested and searched incident to arrest but declines to consent to the search of his home. The agents search it anyway and find not only $30,000 in counterfeit currency but plates and printing equipment as well. Were the judge prohibited from taking the evidence uncovered in the search of Mr. X's home into consideration in calculating the offense level, Mr. X would get a substantially harsher sentence than would Mr. Y even though it was Mr. Y, not Mr. X, who in fact had engaged in the more serious conduct.

Additionally, prohibiting the consideration of illegally seized evidence at sentencing would run counter to the holding of the one circuit court case that has considered the issue at hand. In *United States v. Torres*,[185] decided just this past March, the government and defendant had entered into a plea agreement which included a stipulation to the effect that a kilogram of cocaine seized in violation of the fourth amendment would not be considered for purposes of computing the sentencing range.[186] At sentencing, however, the judge, over the objections of both the prosecutor and the defendant, took the illegally seized cocaine into account in calculating the applicable sentencing range.[187] The judge also denied the defendant's request to withdraw his guilty plea.[188]

On appeal, the Third Circuit upheld the judge's inclusion of the illegally obtained evidence in determining the sentencing range.[189] The appellate court first outlined the Supreme

184. *See supra* notes 158-59 and accompanying text.
185. No. 90-5545, slip op. (3d Cir. March 1, 1991).
186. *Id.* at 2.
187. *Id.* at 3.
188. *Id.*
189. *Id.* at 9.

Court's delineation of the purposes and scope of the exclusionary rule, including *Calandra*.[190] It then turned to the Sentencing Reform Act and the Guidelines, noting, for instance, the "no limitations" rule and the definition of relevant conduct as including "all acts or omissions."[191] Furthermore, the court observed, "Under the Guidelines, the quantity of illegal drugs is a particularly important factor in arriving at an appropriate sentence." [192] The court concluded:

> [W]e have no difficulty in upholding the sentencing judge's consideration of the suppressed evidence here. . . .
>
> Consideration of the suppressed evidence is consistent with the caselaw on the exclusionary rule and follows the well-established practice of receiving evidence relevant to sentencing from a broad spectrum of sources. We hold, therefore, that evidence suppressed as in violation of the Fourth Amendment may be considered in determining appropriate guideline ranges.[193]

The Third Circuit then turned to the issue of whether the defendant should be allowed to withdraw his guilty plea under the circumstances and remanded the case to the district court for such a determination.[194]

Moreover, the courts have made clear in other contexts that the Guidelines contemplate consideration of the full range of available information and have looked askance on attempts to place boundaries on the evidence that may be utilized in determining the applicable sentencing range and where a sentence should fall within that range. For instance, a number of courts have held that even evidence going to charges in a multi-count case of which the defendant has been acquitted may be utilized

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190. *Id.* at 3-6.

191. *Id.* at 6-8.

192. *Id.* at 8.

193. *Id.* at 8-9. The court specifically stated that the holding did not address circumstances such as those present in *Verdugo*, as that issue was not before the court on appeal. *Id.* at 9.

194. *Id.* at 9-15. There is only one other reported case in which a court has addressed the treatment of evidence obtained in violation of the fourth amendment for purposes of Guidelines calculations. In a footnote in *United States v. Rullo*, 748 F. Supp. 36 (D. Mass. 1990), the court stated, without further explanation, "As the court has informed the parties in connection with Rullo's proffered plea, in this case at least, the suppression of the firearm for the purposes of computing the applicable Sentencing Guidelines is also necessary and appropriate to effectuate the purposes of the exclusionary rule." *Id.* at 45 n.6 (citing, *inter alia*, *Calandra* and *Verdugo*).

in determining the defendant's sentence on those charges upon which he was convicted.[195] Evidence relating to charges which were dismissed should likewise be utilized in calculating the sentencing range,[196] even where the dismissal was pursuant to a plea agreement.[197] Evidence that, although obtained improperly, is indisputably relevant to determination of an appropriate sentence should be treated no differently.[198]

B. Discretionary Consideration

Another possibility is to let judges exercise discretionary power over whether illegally obtained evidence should be utilized in calculating the appropriate offense level.[199] Under this approach it would be the judge's call, upon his assessment of

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195. *See, e.g.*, United States v. Rodriguez-Gonzalez, 899 F.2d 177, 181 (2d Cir. 1990) (enhancement of sentence based on conduct underlying weapons charge of which defendant acquitted constitutional and permissible); United States v. Isom, 886 F.2d 736, 738-39 (4th Cir. 1989) (not a violation of due process to adjust defendant's base offense level based upon undisputed evidence pertaining to counterfeiting charge of which defendant was acquitted); United States v. Juarez-Ortega, 866 F.2d 747, 749 (5th Cir. 1989) (not abuse of discretion for sentencing judge to consider underlying facts of offense of which defendant was acquitted if facts meet "reliability standard").

196. *See Juarez-Ortega*, 866 F.2d at 748 ("the court may properly consider past crimes, including those for which a defendant has been indicted but not convicted, as well as the factual basis of dismissed counts."); United States v. Lewis, 862 F.2d 748, 750 (9th Cir. 1988) ("[a] sentencing judge may consider evidence of counts for which an indictment has been dismissed by the government."), *cert. denied*, 489 U.S. 1032 (1989).

197. *See, e.g.*, United States v. Smith, 887 F.2d 104, 105 (1989) (in determining sentence, "the district court should . . . consider[ ] drug quantities charged in a count dismissed under a plea agreement."); United States v. Williams, 879 F.2d 454, 456-57 (8th Cir. 1989) (sentencing judge's consideration in adjusting base offense level of conduct underlying dismissed counts under plea agreement was proper).

198. *See Torres*, No. 90-5545, slip op. at 6-9.

199. This appears to be the approach that the court took in *Rullo*, 748 F. Supp. at 45. This also, although it is not perfectly clear from the Third Circuit's opinion, may have been the view of the *Torres* court. *Torres* talks of the discretion afforded judges even under the Guidelines system, *see Torres*, No. 90-5545, slip op. at 7-8, and states as its holding that illegally obtained evidence "may"—as opposed to "should"—be considered. On the other hand, *Torres* specifically notes that under the Guidelines all relevant conduct "shall" be considered, *id.* at 8, which may bespeak an intention on the part of the court that inclusion of the evidence be, at least absent a *Verdugo*-type situation, mandatory.

the circumstances surrounding the search of our hypothetical Mr. A's home, as to whether the evidence unearthed as a result of the search should be ignored for purposes of arriving at an offense level — yielding a level of nine — or should be included as part of the information used to determine the offense level — which would lead to an offense level of fifteen.

Such an approach, however, does not fully comport with the structure and philosophy of the Guidelines. It is true that the pre-Guidelines case law ultimately left to individual judges the decision as to the role that unlawfully obtained evidence should play in sentencing. One of the most fundamental purposes of the Guidelines, however, was to set out for judges the factors that are to be considered in sentencing determinations and to assign the appropriate weight to the broad range of such factors. Under the Guidelines system, it is not for individual judges to decide for themselves based upon their own predilections the offense level that follows from the commission of a given criminal act by an offender with a specific set of characteristics under a particular set of circumstances. Rather, the offense level applicable to a case should follow ineluctably from the process of weighing and calculating the assigned numerical values that the Guidelines meticulously set forth. Indeed, one might convincingly argue that were the calculation of offense levels to become the product of subjective judicial evaluation, there would remain little to justify the continued existence of the Guidelines system.[200] The Guidelines explicitly declare that offense level "*shall be determined*" on the basis of all acts that a defendant took in connection with the commission of an offense.[201] Therefore, not only is there nothing in the Guidelines to support giving judges the option of excluding inarguably relevant information from calculations of offense level, but the granting of such discretionary authority would contravene both

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200. After all, the quantification and calculation of sentencing determinations that the Guidelines seek to establish would be nothing more than new packaging for the old system of judicial discretion if the calculations mandated by the Guidelines rested on nothing more than judges' subjective assessments of the equities of given cases.

201. GUIDELINES MANUAL, *supra* note 1, § 1B1.3, at 1.16 (emphasis added); *see supra* note 182 and accompanying text.

the purpose of and an explicit directive contained in the Guidelines.

C. *Mandatory Consideration*

Another possible approach to the treatment of illegally obtained evidence at sentencing is the flip side of a blanket rule prohibiting its use, *i.e.*, a rule stating that courts *must* consider the evidence in calculating the offense level.[202] Such an approach is undoubtedly consistent with the dictates and spirit of the Guidelines. As previously noted, under the Guidelines, all acts undertaken by a defendant in connection with a crime are considered relevant conduct that is to be taken into account in determination of the applicable sentencing range.[203] It therefore would seem to follow that all evidence relating to the criminal conduct of a defendant, no matter what its source, should be considered in all cases under the Guidelines for purposes of calculating the sentencing range.[204]

Additionally, a requirement that judges include illegally obtained evidence in sentencing procedures, in contrast to a rule prohibiting the consideration of such evidence, is consistent with the pre-Guidelines law holding that, except in unusual circumstances, the exclusionary rule does not apply to sentencing proceedings and that judicial consideration of illegally obtained

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202. In applying this approach to our example, a judge would be *required* to assign an offense level of fifteen and, absent grounds of departure, impose a sentence ranging from eighteen and twenty-four months. *See supra* text accompanying notes 168-72. As is noted above, *see supra* note 199, although the holding of the *Torres* court is not crystal clear, it could be read as requiring, as a general rule at least, the mandatory inclusion of illegally obtained evidence rather than leaving the matter to the sentencing judge's discretion.

203. *See supra* notes 182, 201 and accompanying text.

204. In contrast, a rule that the judge *must* consider illegally obtained evidence in determining the appropriate sentence once the applicable sentencing range has been calculated would be completely at odds with the Guidelines system. 18 U.S.C. § 3661 (1988) and Guidelines § 1B1.4 proscribe the placing of limitations (other than those required by law) upon the information that a judge may consider in determining where within a sentencing range a given sentence should fall, and absolutely nothing in the Guidelines attempts to control decisions in this regard. Indeed, it is precisely in the determination of an appropriate sentence within an established sentencing range that the core of judicial discretion within the Guidelines system lies.

evidence at sentencing does not infringe upon any constitutional guarantee. Thus, reading the Guidelines so as to impose upon judges the requirement that illegally obtained evidence, like any other relevant evidence, should be factored into Guidelines calculations brings to bear upon practice under the Guidelines principles of substantive constitutional law that, while pre-dating the implementation of the Guidelines, are both fundamentally compatible with and applicable to them.

Nonetheless, a rule establishing, without more, that courts must in every case without exception consider all relevant conduct, including evidence of conduct that was obtained in violation of the fourth amendment, has its own set of problems. First, although such a rule might seem to be consistent with the pre-Guidelines case law, that case law does not stand for the proposition that consideration of such evidence is *required*.[205] Rather, the cases hold simply that, under most circumstances, it would not be an abuse of the judge's discretion if she chose to factor such evidence into her determination of the sentence to be imposed. Because neither Congress nor the Sentencing Commission has addressed the interplay between the Guidelines and the exclusionary rule, it cannot be said that Congress or the Sentencing Commission ever intended to alter this jurisprudence in such a fundamental manner.

Moreover, there is nothing in the Guidelines' purposes, structure, or specific provisions or policy statements that suggests, either explicitly or implicitly, a repeal of pre-Guidelines law addressing the role of constitutionally-based rules and principles in sentencing proceedings. The Sentencing Reform Act and Guidelines cannot reasonably be read to have turned, *sub silentio*, a rule that allowed a judge the option of considering evidence in determining an appropriate sentence despite its illegal taint into a rule that forces him to do so regardless of the circumstances surrounding the obtaining of this evidence.

Furthermore, a requirement that the sentence imposed on a defendant, of necessity, reflect the fruits of even blatantly un-

205. *See* United States v. Williamson, 567 F.2d 610, 616 (4th Cir. 1977) ("the district court may have been wise in not basing its sentence upon [illegally obtained evidence] . . . ."); *see also supra* note 79.

constitutional searches would create a perverse incentive for law enforcement officials to undertake searches and seizures that are violative of the fourth amendment. While it may have been reasonable to conclude, as the pre-Guidelines cases did, that little additional deterrent value would be added were law enforcement officials to know that illegally obtained evidence could not be used to enhance punishment at sentencing,[206] the same could not necessarily be said were such officials to know that, no matter how they conducted a search, its fruits would have to be utilized at sentencing and would necessarily result in the individual whose fourth amendment rights they had violated serving a significantly longer prison term.

Under the Guidelines, moreover, the severity of a sentence is often directly linked to the quantity of the evidence obtained.[207] The length of a sentence is thus not only more predictable than under the traditional system of nearly absolute judicial discretion, but more manipulable by law enforcement agents. Sentencing under the Guidelines is also highly transaction specific, *i.e.*, the actual items of evidence relevant to the charged offense play a far greater role in the determination of sentence than mere impressionistic assessments of the character of the individual defendant. Agents, like other participants in and observers of the new Guidelines system, are presumably cognizant of the increased effect that the choices they make may play in the ultimate sentence and can predict with reasonable certainty the effect that, for instance, the discovery of a kilogram, rather than only ten grams, of cocaine will have on the sentence imposed upon a known drug dealer. If agents know that a judge — even if he believes that the agents acted in deliberate and blatant disregard of the fourth amendment — *must* increase the offense level and the resulting sentence regardless of the nature of the agents' actions, then the Guidelines system will have the result of promoting, rather than deterring, actions such as those which the agents undertook in *Verdugo*.

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206. The authors expressly decline to take a position on the correctness of this assumption.

207. *See, e.g., supra* note 174 and accompanying text.

D. A Proposed Solution: A Departure Approach

The Guidelines themselves indicate a way out of any seeming tension between the Guidelines and pre-Guidelines case law on the relationship between sentencing and the exclusionary rule that preserves the essential objectives of the Guidelines system while adhering to the principles upon which the pre-Guidelines case law is premised. Although looking for uniformity, the Guidelines do not abandon the ideal of individualized sentencing, nor is it their purpose completely to emasculate judges' ability to exercise discretion in the imposition of sentence. It is not that the Guidelines wish to declare judicial discretion in sentencing dead; rather, they attempt to control it through limitation of its exercise to certain defined situations.

To that end, judicial discretion should *not* play a role in the calculation of offense level and the resultant determination of applicable sentencing range. However, once the sentencing range has been set, the judge retains complete discretion to decide where within that range the sentence should fall. Thus, a judge who is not troubled by the circumstances surrounding the discovery of the counterfeit bills in our hypothetical Mr. A's home and concludes that Mr. A is deserving of the maximum available prison term could order that a sentence of twenty-four months be served.[208] On the other hand, should the judge be disturbed by the search, he retains the discretion to give force to the perceived troubling nature of the search by ordering instead the minimum sentencing range term of eighteen months.[209]

More significantly, the Guidelines do not require that in every case, without exception, the judge impose a term of incarceration that falls within the sentencing range the Guidelines indicate generally to be appropriate. A judge retains the power to depart from an otherwise applicable sentencing range

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208. Twenty-four months is the maximum term of incarceration available under the sentencing range applicable where a defendant with a criminal history category of I has engaged in conduct with an offense level of 15. GUIDELINES MANUAL, *supra* note 1, § 5A, at 5.2.

209. Eighteen months is the minimum sentence available under the sentencing range that results from the intersection of criminal history category I and offense level 15. *Id.*

where she finds "that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described."[210] It is this authority to depart from an otherwise binding sentencing range that provides a means to reconcile any tension between pre-Guidelines case law giving courts discretion to consider or reject illegally obtained evidence in sentencing and the otherwise seemingly inflexible imperative of the Guidelines that all relevant conduct be factored into the ultimate sentence.

Every time that evidence is suppressed it is because law enforcement agents did something violative of the Constitution.[211] The Guidelines, however, do not take into account the illegality of the source of information used to calculate sentencing range as a possible mitigating factor in the imposition of sentence.[212] A judge presented with a request for departure on the basis of the fact that certain evidence being used against a defendant had been unlawfully obtained would thus need to determine whether, under the circumstances of the case before him, the illegal source of the information "should result in a sentence different from that described [in the Guidelines]."[213] In making this determination, the judge should evaluate where on the continuum of degrees of wrongdoing the agents' actions lie and the extent to which the goal of deterring future violations of the fourth amendment would be furthered by downward departure from the sentence that would otherwise be required.

Compare, for example, the following situations: Mr. J, who appears to fall within the standard "drug courier profile,"[214] is stopped at the airport and searched. He is found to be in pos-

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210. 18 U.S.C. § 3553(b) (1988).

211. Under United States v. Leon, 468 U.S. 897 (1984), if the search and seizure is improper only in that a warrant upon which officers reasonably relied in good faith is later found to have been technically defective, the evidence resulting from that search would not have been suppressed in the first place. *See supra* note 23.

212. *See* GUIDELINES MANUAL, *supra* note 1, §§ 5K1.1 to 5K2.15, at 5.41-.47. *See also supra* text accompanying note 157.

213. 18 U.S.C. § 3553(b) (1988).

214. Since 1974, the Drug Enforcement Administration has utilized "drug courier profiles" which it believes match the characteristics of many drug couriers as a

session of cocaine. A court later rules that the stopping and searching of this individual, while not done maliciously, was not supported by the requisite probable cause. Agents also believe, based upon a "hunch" an informer has expressed, that another individual, Mr. K, is involved with the smuggling and selling of narcotics. Accordingly, when Mr. K is away on vacation, the agents, without ever seeking to obtain a warrant and for the very purpose of attempting to enhance Mr. K's incarceration should he be charged and convicted, break into and ransack his house and in fact do uncover a certain amount of drugs. Faced with these two situations, a judge might well conclude in sentencing Mr. J and Mr. K after their respective convictions for drug-related activities that the agents' actions with respect to Mr. J were not so egregious as to justify a departure from the generally applicable sentencing range, but that the agents' actions in Mr. K's case were so far along the continuum of governmental wrongdoing that the situation calls for the strong medicine of a downward departure.

Similar results might well obtain where a defendant with a shaky grasp of English gives what an officer reasonably believes to be a valid consent to a search but which a judge later rules to be invalid, while the consent of a second defendant was never even requested or was coerced through actual or threatened violence. In any event, the decision as to whether to depart should be one for the court to determine in its discretion upon consideration of the given circumstances before it.

The judge's assessment of where on the continuum the wrongdoing lies should determine not only *whether* the judge should depart from the sentencing range but also the *extent* of such departure. Departure should not be an either/or decision: The judge should not be faced with the choice merely of adhering to the sentencing range that would generally be applicable or, if he feels departure to be warranted, handing down a sentence within the sentencing range that would have been applicable had the evidence not been available in the first place. Rather, the judge should be free to order a sentence anywhere

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means of attempting to identify drug smugglers. *See* United States v. Sokolow, 109 S. Ct. 1581, 1587 & n.6 (1989).

between these two extremes. In other words, should the judge decide that departure is warranted in the first place, he may impose a sentence anywhere between the floor of the minimum sentence that would have been available under the Guidelines had the unlawful evidence not been considered at all and the ceiling of the maximum sentence permissible under the sentencing range that in fact applies to the case.

The ability to determine not only if departure is warranted but also the extent of such departure serves several different purposes. For one, it furthers the exclusionary rule's goal of deterrence by permitting direct correlation between the extent of departure and the perceived destructiveness of the specified behavior in which law enforcement officers engaged and which society wishes to deter. It additionally gives courts the ability in appropriate cases to minimize the disparity between the sentence to be served by similarly situated defendants while still allowing for consideration of wrongdoing by agents. It is also consistent with the principle that the existence of a greater power generally includes a lesser power. If judges have the power to depart downward all the way to the sentencing range that would have been applicable had the illegally obtained evidence never been discovered in the first place, there is no valid reason why they should not also have the power to impose a sentence that, while not as harsh as the sentence that would have been handed down but for the departure, is still more reflective of the defendant's actual conduct than would be a sentence under a sentencing range that completely disregards the existence of the evidence.

Granting judges the discretionary power to depart from otherwise mandatory sentencing ranges in response to review of the circumstances surrounding illegally obtained evidence may, upon first consideration, appear similar to the suggestion, dismissed above,[215] that judges be allowed to exercise discretionary power over the initial calculation of the offense level and the sentencing range that follows from it. The effect, it might be claimed, is the same in either case: The judge is given the authority to impose a sentence of lesser duration from that

215. *See supra* notes 199-201 and accompanying text.

which would necessarily be ordered were the illegally obtained evidence be given its full effect.

The two approaches, however, are markedly different in a number of respects, both on a philosophical level and in their practical effect. To take the broader aspect first, the Guidelines — which were developed with the overriding purpose of constraining discretion and channeling it within a realm that is both justifiable and necessary — are designed to keep judicial discretion from playing a role in the calculation of offense levels. At the same time, however, maintenance of judicial leeway to depart in appropriate circumstances from otherwise mandated sentencing ranges is an integral part of the Guidelines system that Congress and the Sentencing Commission have developed.[216] Adherence to a uniform and delineated process that works within an established, consistent, and intellectually justifiable set of procedures is anything but an empty value, especially where an issue as fundamental as the duration for which a person may legitimately be deprived of his freedom is at stake.

On a slightly less abstract, but no less important plane, our departure approach supplies judges with an element of flexibility that a system allowing a discretionary choice of offense levels would lack. Under a choice-of-offense-levels system, illegally seized evidence would, as a matter of logic, have an either/or effect on the assessment of offense level: either the illegally obtained evidence would be factored into calculation of the offense level or it would not. Thus, under this system, the judge sentencing our hypothetical Mr. A could sentence him either in accordance with the sentencing range that corresponds to an offense level of nine or that which corresponds to a level of fifteen. Under the departure approach, as we have explained above,[217] the judge could reasonably impose a sentence consistent with any level between nine and fifteen.

Allowing judges to consider requests to depart based on the utilization of illegally obtained evidence in calculation of the

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216. *See* 18 U.S.C. § 3553(b) (1988); GUIDELINES MANUAL, *supra* note 1, §§ 5K1.1 to 5K2.15, at 5.41-.47; *see also supra* notes 151-56 and accompanying text.

217. *See supra* notes 210-15 and accompanying text.

offense level while prohibiting direct manipulation of the offense level itself yields yet another advantage in that it emphasizes the extraordinary nature of a request for a lower sentence merely because certain of the information that is known about the defendant was obtained improperly. Disputes between parties over offense level simply require judicial resolution of the issue of which level is more appropriate given the nature of the offense and the known facts about the defendant. Departures, however, are a tightly circumscribed exception to the general rules governing available sentences and are to be granted only in the unusual case. The presumption is that a departure is not warranted, and the party moving for a departure bears the burden of demonstrating its necessity.[218] Departures, especially downward departures, are only rarely ordered,[219] and refusal to depart, unlike the choice of applicable offense level, is not ap-

218. *See, e.g.*, United States v. Zamarripa, 905 F.2d 337, 341 (10th Cir. 1990) (government bears burden of proving "extreme psychological injury" required for upward departure pursuant to § 5K2.3 of Guidelines); United States v. McDowell, 888 F.2d 285, 291-92 (3d Cir. 1989) (party seeking departure, either upward or downward, bears burden); United States v. Urrego-Linares, 879 F.2d 1234, 1239 (4th Cir.) (defendant has the burden of proving mitigating factors necessary for allowing reduction in offense level), *cert. denied*, 110 S. Ct. 346 (1989); United States v. Egan, 742 F. Supp. 1003, 1007 (N.D. Ill. 1990) ("the burden must lie with the defendant . . . to show that a [downward] departure [for providing substantial assistance to authorities] . . . is justified in the absence of a government motion"); United States v. Cruz, 729 F. Supp. 94, 95 (S.D. Fla. 1989) (defendant failed to meet burden of showing that she provided substantial evidence to authorities for downward departure under § 5K1.1 of Guidelines); *cf.* United States v. Kirk, 894 F.2d 1162, 1163-64 (10th Cir. 1990) (for a decrease in offense level, "the defendant has the burden of establishing by a preponderance of the evidence the applicability of the mitigating factor in question").

219. *See supra* note 156 and accompanying text.

pealable.[220] The extent to which a judge departs from the Guideline range is similarly not appealable.[221]

Accordingly, under our proposal, judges should by no means grant a defendant's request for a downward departure simply because certain evidence was obtained illegally. Departure on the basis of violation of the fourth amendment should, consistent with the extraordinary nature of any departure from the

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220. *See, e.g.*, United States v. Bayerle, 898 F.2d 28, 30 (4th Cir.) (following "sound precedent that denies review of refusal to depart downward"), *cert. denied*, 111 S. Ct. 65 (1990); United States v. Evidente, 894 F.2d 1000, 1004 (8th Cir.) ("This Court is not empowered . . . to review a sentencing court's exercise of its discretion to refrain from departing upward or downward from . . . [the Guidelines]."), *cert. denied*, 110 S. Ct. 1956 (1990); United States v. Morales, 898 F.2d 99, 102 (9th Cir. 1990) (refusal of sentencing judge to depart downward from the applicable sentencing range not reviewable); United States v. Tucker, 892 F.2d 8, 11 (1st Cir. 1989) (refusal of downward departure not reviewable); United States v. Colon, 884 F.2d 1550, 1552 (2d Cir.) (same), *cert. denied*, 110 S. Ct. 553 (1989); United States v. Denardi, 884 F.2d 269, 272 (3d Cir. 1989) (no appellate jurisdiction to review district judge's refusal to depart from the applicable sentencing range); United States v. Rojas, 868 F.2d 1409, 1410 (5th Cir. 1989) (court will uphold district judge's refusal to depart from applicable sentencing range "unless the refusal was in violation of law."); United States v. Draper, 888 F.2d 1100, 1105 (6th Cir. 1989) (sentence within guideline range is not appealable on grounds that judge refused to depart from applicable sentencing range); United States v. Franz, 886 F.2d 973, 980 (7th Cir. 1989) (agreeing with Fifth Circuit's treatment); *cf.* United States v. Fossett, 881 F.2d 976 (11th Cir. 1989) (defendant may challenge sentence where judge fails to depart from Guidelines because he doubts his authority to do so), *cert. denied*, 111 S. Ct. 206 (1990).

221. *See, e.g.*, United States v. Parker, 902 F.2d 221, 222 (3d Cir. 1990) (extent of departure not reviewable where district court has granted downward departure); United States v. Ybabez, 919 F.2d 508, 510 (8th Cir. 1990) (same). This inability to challenge on an appellate level refusals to depart or the extent of departure ordered results in the fact that a sentencing judge's decision will be essentially unreviewable. Thus, the final say as to a constitutionally-based issue will be left almost entirely in the domain of the trial courts. To those who might conceivably be troubled by this aspect of our proposal we have two answers: First, this result may not be entirely negative and, in fact, is to a large degree consistent with the overall approach of the Guidelines to the matter of departures. As the Third Circuit observed in United States v. Ryan, 866 F.2d 604 (3d Cir. 1989), "[T]he sentencing court has been given a good deal of discretion in deciding whether to depart from the guidelines, in part because the Commission seeks to monitor such departures and, over time, create more accurate guidelines." *Id.* at 609. Second, should appellate courts conclude that such matters, with their constitutional basis and implications, are too important to lie completely within the bailiwick of the district courts, they can readily carve out an exception to the general rule against appellate review of departure decisions.

sentencing range mandated by the Guidelines, be granted in only exceptional circumstances.[222]

Furthermore, allowing modification of the offense level as a means of accounting for unconstitutional actions would be highly impracticable. Under the Guidelines, it is the United States Probation Office that collects the information pertinent to the crime and the defendant who commits it and calculates for the court's use the offense level and sentencing range that follow from this information.[223] Were defendants able successfully to claim that the relevant offense level should vary depending upon the source of the information used to calculate it, probation officers would in many cases be stymied in their efforts to ascertain the appropriate offense level, the establishment of which guides the remainder of the report that the officers are required to prepare for the court's guidance. Under the departure approach which we advocate, probation officers' ability to calculate the applicable offense level would be unhindered and the report could simply indicate that possible grounds for departure exist based on the defendant's claim that certain of the evidence was seized illegally. Such a report would not only be easier to prepare but would be easier for the parties to respond to and for the judge to consider and apply.

It might also appear that illegally obtained evidence could be treated under the Guidelines as readily through an *upward* departure approach as through the downward departure analysis which we propose. Under an upward departure approach, the offense level would be calculated without taking into account the evidence seized in violation of the fourth amendment. The judge would then have discretion to consider the existence

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222. It should be noted that departure based upon violation of the fourth amendment is slightly different in character from most of the grounds for departure permitted under the Guidelines. For one, the focus is on the government's conduct rather than that of the defendant and its effect. Additionally, the justification for the type of departure discussed in this Article stems from analysis of a legal issue — the effect that contravention of the dictates of the fourth amendment should have at sentencing — rather than a purely factual inquiry into the circumstances surrounding the commission of a crime. *See supra* notes 153, 156.

223. *See* GUIDELINES MANUAL, *supra* note 1, § 6A1.1, at 6.1. The government and the defendant may challenge the probation officer's findings. *Id.* § 6A1.3, at 6.2.

of such evidence as an "aggravating circumstance"[224] that warrants the imposition of a sentence higher than that otherwise mandated by the sentencing range applicable given the calculation of the offense level without regard to this evidence.

An upward departure approach would possess many of the benefits that stem from our downward departure approach: It would, for instance, give effect to the deterrent purposes of the exclusionary rule and channel judicial discretion within the bounds permissible under the Guidelines to an extent no less than would our suggested approach. It would likewise be consistent with the pre-Guidelines case law, under which judges were permitted to consider illegally seized evidence at sentencing but had no obligation to do so.

An upward departure approach, however, would run squarely against the Guidelines' definition of the relevant conduct to be considered in establishment of the offense level as including all acts undertaken by a defendant in connection with the crime that he has committed.[225] Moreover, given the exceptional nature of departures and the presumption that departures are not ordinarily warranted, a result of an upward departure approach might be the imposition on certain defendants of lighter sentences than the facts surrounding their actions would otherwise indicate or that furtherance of the deterrent purpose of the exclusionary rule might seem to justify. Thus, the system which the Guidelines establish is better served by an approach that requires that illegally obtained evidence be factored into calculations which determine the sentencing range and that any departure deemed warranted be a downward departure from that range.

An approach that views the fact that evidence has been obtained in violation of the fourth amendment as a possible ground for downward departure melds the concerns and rationale of the pre-Guidelines law on the role of the exclusionary rule in sentencing proceedings with the philosophy and structure of the Guidelines. Such a perspective recognizes that all relevant evidence, even if illegally obtained, must be brought to

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224. 18 U.S.C. § 3553(b) (1988).

225. GUIDELINES MANUAL, *supra* note 1, § 1B1.3 at 1.18.

bear on calculations of offense level and the setting of the sentencing range. It also recognizes the broader purpose of the Guidelines to curtail judicial discretion and promote uniformity in the sentencing of similar defendants for similar crimes. It builds upon the presumption, established in the case law developed prior to the implementation of the Guidelines, that as a general matter the exclusionary rule has no bearing upon the sentencing stage of criminal proceedings. At the same time, this approach allows judges to exercise their discretion within the constraints of the Guideline system to prevent miscarriages of justice in unusual cases, act in accordance with jurisprudence on the exclusionary rule that both pre-dates and survives the passage of the Sentencing Reform Act and promulgation of the Guidelines, and further the purposes of both the exclusionary rule and sentencing determinations themselves. In sum, the inclusion of even illegally obtained evidence in calculations of sentencing range while at the time permitting of the possibility that the needs of equity and the enforcement of constitutional guarantees may in certain limited situations call for the exercise of judicial discretion in departing from the Guidelines will allow judges simultaneously to fulfill their duties under both the Guidelines and the broader realm of constitutional jurisprudence.

CONCLUSION

The Sentencing Reform Act of 1984 and the United States Sentencing Commission's consequent promulgation of its Sentencing Guidelines have transformed federal sentence procedures in ways both intended and unenvisioned. The Guidelines touch upon nearly every aspect of sentencing proceedings in federal court and, given the magnitude of the changes they have wrought, require assessment of the viability of even settled constitutionally related jurisprudence which Congress and the Sentencing Commission gave no indication of having wished to disturb.

One such area which necessitates re-evaluation is the relationship between sentencing determinations and the exclusionary rule that derives from the fourth amendment's proscription against unreasonable searches and seizures. Although analysis

demonstrates that the pre-Guidelines law on the subject is no less valid in the wake of the implementation of the Guidelines, the wholesale changes in the manner in which criminal defendants are now sentenced mandates that a concomitant tailoring of the extent to which fourth amendment concerns do or do not play a part in sentencing matters be undertaken. Consideration of various possible ways in which judges might handle concededly relevant, illegally obtained evidence in sentencing a defendant under the Guidelines yields only one solution that adequately conforms with both the philosophy and structure of the Guidelines on the one hand and the logic underlying and holdings of the relevant pre-Guidelines case law on the other. The demands of the newly-implemented Guidelines and pre-existing constitutionally-based law can each be satisfied only through a system that requires even illegally obtained evidence to be utilized in calculating the applicable sentencing range but also recognizes that the circumstances surrounding the unlawful seizure of evidence from a defendant may in exceptional cases constitute a mitigating factor that a judge in his discretion may reasonably conclude warrants a downward departure from the sentencing range the Guidelines would otherwise mandate.